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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BLAZE CONSTRUCTION CO., INC.,
Petitioner,

v.

THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the principle that federal contractors are not federal instrumentalities constitutionally immune from state taxes, render the Indian preemption doctrine inapplicable to state taxation of a contractor hired by the Bureau of Indian Affairs (BIA) to construct on-reservation projects for Indian tribes, even though: the BIA is carrying out its unique trust responsibility to act in the tribes' place until they decide to assume the contracting function; the state tax on BIA contractors interferes with federal Indian policy; and the state tax would be preempted had the tribes exercised their statutory right under the Indian Self-Determination and Education Assistance Act to displace the BIA and award the identical federally-funded contract themselves.

2. If the Indian preemption doctrine applies, did *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), modify *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982) by holding that federal Indian laws, regulations and policy are outweighed by the state's general interest in raising revenue, so that a state which provides no services or regulation related to an on-reservation project may tax the contractor constructing that project.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
A. The Relevant Federal Statutes	3
1. The Indian Self-Determination Act	3
2. Indian Reservation Roads Legislation	5
B. The Blaze Contracts	6
C. Proceedings Below	8
1. The Tax Department Assessment and Determination	8
2. Judicial Proceedings	9
a. The New Mexico Court of Appeals	9
b. The New Mexico Supreme Court	10
REASONS FOR GRANTING THE PETITION	12
I. INTRODUCTION	12
II. THE INDIAN PREEMPTION DOCTRINE SHOULD APPLY TO STATE TAXATION OF BIA AS WELL AS TRIBAL CONTRACTORS HIRED FOR ON-RESERVATION CONSTRUCTION	14
A. The Federal Instrumentality Doctrine Does Not Foreclose Application of the Indian Preemption Analysis if the BIA's Activity Substantially Impacts Federal Indian Policy	14

TABLE OF CONTENTS—Continued

Page

B. The BIA is so Integral to the Federal Indian Trust Responsibility that Indian Preemption Analysis Should Apply 15

1. The BIA has Unique Trust Responsibilities Towards Tribes and Individual Indians 15

2. Application of the Indian Preemption Doctrine to Tribal Contractors But Not to BIA Contractors Interferes With the Congressional Scheme Established by the Self-Determination Act 16

C. There is No Support in the Caselaw or Underlying Policy for Threshold Criteria That Apply the Indian Preemption Analysis Only to Cases in Which the Tribe is a Direct Party 21

III. UNDER THE PREEMPTION ANALYSIS IN *COTTON PETROLEUM*, THE STATES ARE PREEMPTED FROM IMPOSING GROSS RECEIPTS TAXES ON BIA CONTRACTORS THAT CONSTRUCT FACILITIES ON RESERVATIONS FOR THE BENEFIT OF INDIANS 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943) 15
Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) 19
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) ..... *passim*
Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) 13, 25
McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) 19
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 12
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 12, 19
Morton v. Mancari, 417 U.S. 535 (1974) 12, 15, 16
Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) 21
Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) ..... *passim*
United States v. Mitchell, 463 U.S. 206 (1983) 5
United States v. New Mexico, 455 U.S. 720 (1982) .. 8, 9, 10, 14
Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) 19
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

STATUTES

Buy Indian Act, 25 U.S.C. § 47 (1988) 6
Department of the Interior Appropriations, Pub. L. No. 97-100, 95 Stat. 1391 (1981) 5
Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379 (1993) 20
Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988) 7
Indian Health Care Improvement Act, 25 U.S.C. § 1631 (1988) 5
The Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994) 2, 17

TABLE OF AUTHORITIES—Continued

	Page
Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq.* (1988 & Supp. V 1993)	
§ 3(b), 25 U.S.C. § 450a(b) (1988)	3
§ 7(6), 25 U.S.C. § 450e(b) (1988)	6
§ 102(a), 25 U.S.C. § 450f (1988)	5
§ 102(a), 25 U.S.C. § 450f(a)	3, 4
§ 111(2), 25 U.S.C. § 450n(2) (1988)	4, 19
§ 205, 25 U.S.C. § 458 (1988)	5
Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2288 (1988)	2
Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914, 1919 (1991)	20
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2099 (1983)	6
Surface Transportation Assistance Act of 1982, 23 U.S.C. § 204 (1988 & Supp. V 1993)	2
§ 126(b), 23 U.S.C. § 204 (1988)	5, 6
23 U.S.C. § 204(b) (1988)	6
23 U.S.C. § 204(c) (1988)	6
23 U.S.C. § 204(e) (1988)	6
Tax Injunction Act, 28 U.S.C. § 1341 (1988)	14
28 U.S.C. § 1257 (1988)	2
New Mexico Gross Receipts And Compensatory Tax Act,	
N.M. Stat. Ann. § 7-1-24 (Michie 1978)	8
N.M. Stat. Ann. § 7-9-4 (Michie 1978)	2, 8
N.M. Stat. Ann. § 7-9-7 (Michie 1978)	2, 8

REGULATIONS

25 C.F.R. Part 170	17
25 C.F.R. §§ 170.1-170.19	2
25 C.F.R. §§ 170.4a	16
25 C.F.R. § 170.6	6
25 C.F.R. § 170.6a	6, 16
25 C.F.R. § 170.16(c)	6, 16
25 C.F.R. §§ 271.1-271.5	2

TABLE OF AUTHORITIES—Continued

	Page
25 C.F.R. § 271.4(d)	4, 17
25 C.F.R. § 271.4(e)	4, 18
25 C.F.R. § 271.4(f)	4, 17
25 C.F.R. § 271.12(a)(5)	4
25 C.F.R. § 271.51(b)	4
25 C.F.R. § 271.71	4, 17, 18
25 C.F.R. § 271.72(g)	4
48 C.F.R. §§ 1401-99	17
MISCELLANEOUS	
137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (statement of Rep. Miller)	5, 16
137 Cong. Rec. S7787 (daily ed. June 13, 1991) (statement of Sen. Domenici)	15

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PETITION FOR A WRIT OF CERTIORARI

Blaze Construction Co., Inc. (Blaze) petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico, No. 21,551, filed October 18, 1994 (App. 1a) is reported at 884 P.2d 803 (1994). The opinion of the Court of Appeals of New Mexico, No. 12,120 filed Sep-

[1] In addition to the captioned parties, ARCO Materials Inc. was a party below in a separate case, N.M. Sup. Ct. No. 22,132, which was consolidated with Blaze's case by the State Supreme Court. During the relevant time period, Blaze Construction Co., Inc. was an Oregon corporation with a single shareholder, Bill Aubrey, a Blackfeet Indian (App. 2a, 18a, 28a). Blaze is now incorporated under the laws of the Blackfeet Nation; Mr. Aubrey continues to be its sole shareholder.

tember 2, 1993 (App. 17a), is reported at 117 N.M. 362, 871 P.2d 1368 (N.M. Ct. App. 1993). The decision and order of the Taxation and Revenue Department of the State of New Mexico issued January 23, 1990 (App. 27a) is unreported.

JURISDICTION

The opinion of the Supreme Court of New Mexico was entered on October 18, 1994 (App. 1a). It became a final judgment upon issuance of the mandate on November 3, 1994 (App. 15a). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1988).

STATUTES AND REGULATIONS INVOLVED

Set forth in the Appendix are pertinent portions of the New Mexico Gross Receipts and Compensating Tax Act, Ch. 7, Article 9, §§ 7-9-4, 7-9-7, N.M. Stat. Ann. (1978); the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 2206, as amended, 25 U.S.C. § 450 1988 & Supp. V 1993 (Self-Determination Act)[2]; and § 126(b) of the Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 2114, 23 U.S.C. § 204 (1988), and relevant portions of regulations of the Bureau of Indian Affairs of the Department of the Interior governing self-determination contracts under the Self-Determination Act, 25 C.F.R. §§ 271.1-271.5 (1994) and Roads of the Bureau of Indian Affairs, 25 C.F.R. §§ 170.1-170.19 (1994).

STATEMENT

This case involves a challenge to gross receipts and compensating taxes assessed by the Taxation and Revenue Department of the State of New Mexico (the Tax Department) on an Indian enterprise that had contracted with the Bureau of Indian Affairs of the Department of the Interior (BIA) to construct Indian reservation roads

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[2] Section 102 was further amended by Title I of Pub. L. 103-413, The Indian Self-Determination Act Amendments of 1994, approved October 25, 1994, 108 Stat. 4250.

located entirely within four Indian reservations. The Supreme Court of the State of New Mexico sustained the assessment. It held that "[b]ecause [Petitioner] contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable and [Petitioner is] subject to state taxes, just as any other federal government contractor would be." (App. 6a-7a). The New Mexico court held, in the alternative, that if the Indian preemption doctrine did apply, this Court had modified that doctrine to give dispositive weight to the state's general interest in raising revenue (App. 12a).

A. The Relevant Federal Statutes

1. *The Indian Self-Determination Act*

The Self-Determination Act has been the dominant expression of the federal government's Indian policy since 1975. The Act's Declaration of Policy provides:

> Congress declares its commitment to . . . the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b), as amended by Pub. L. No. 100-472, § 102, 102 Stat. 2285 (1985).

The substantive provisions of the Self-Determination Act implement this declaration by establishing, as the federal self-determination policy, the right of a tribe to plan, conduct and administer all or parts of any program which the BIA is authorized to administer for the benefit of Indians. 25 U.S.C. § 450f(a). One component of this policy is a tribe's right to choose the degree of involvement it wishes to have in the delivery of the federal government's trust services to it. Under the Act, a tribe may

opt to deliver the services itself (or through a tribal organization such as an Indian school board),[3] using the funds appropriated to the BIA for that function. The tribe does so by entering into a self-determination contract with the BIA setting out how it will deliver those services and the amount of funding it will receive. 25 U.S.C. § 450f(a). Under another option, a tribe may choose to have the BIA provide those services, while the tribe, if it wishes, plans the manner in which the BIA is to operate the program. 25 C.F.R. § 271.4(f). Or the tribe may choose to play no role. If a tribe assumes responsibility for a program, it may at any time retrocede that program to the BIA. 25 C.F.R. § 271.71. Nothing in the Act authorizes termination of the United States' trust responsibility to Indian people. 25 U.S.C. 450n(2).

The regulations implementing the Act provide that: (i) the decision of a tribe to take over a particular function of the BIA through a self-determination contract rests solely with the tribe, 25 C.F.R. § 271.4(d); (ii) self-determination includes the right of the tribe not to deliver the services and instead let the BIA continue to do so, 25 C.F.R. § 271.4(d); and (iii) it is the policy of the BIA not to impose sanctions with regard to a tribe's decision to assume or not to assume responsibility for a particular service or program, or with respect to tribal retrocession of particular BIA functions. 25 C.F.R. §§ 271.4(e) and 271.72(g).

The BIA's regulations, as originally enacted in 1975, excluded individual construction projects from those programs defined as contractible by a tribe under the Act. 25 C.F.R. § 271.12(a)(5). The BIA, however, developed a consistent practice of waiving this exclusion under 25 C.F.R. § 271.51(b), upon request by tribes. In 1988, Congress codified this BIA practice by expressly authorizing tribes to assume the management of construction

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[3] *See Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

projects.[4] When a tribe assumes control over a BIA construction project pursuant to the Self-Determination Act, it, rather than the BIA, becomes the entity that advertises, awards and administers the construction contract.

2. *Indian Reservation Roads Legislation*

Under its general trust obligation to Indians,[5] the United States assists Indian tribes in the development of an infrastructure that will promote economic self-sufficiency. Performance of this trust obligation includes, *inter alia*, the construction of Indian reservation roads (23 U.S.C. § 204),[6] schools (25 U.S.C. § 458) and hospitals (25 U.S.C. § 1631).

Until 1983, Indian roads were constructed with funds appropriated by Congress directly to the BIA for that purpose.[7] In 1983, Congress included the Indian Reservation Road Program in the Federal Lands Highway Program. 23 U.S.C. § 204. Since then, the funds for the roads have come from the Federal Highway Trust Fund, which is financed by the federal gasoline tax. That Fund is managed by the Secretary of Transportation, who transfers monies for Indian roads to the Secretary of the Interior. 23 U.S.C. § 204.

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[4] Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2288 (1988), 25 U.S.C. § 450f (1988).

[5] *See generally, United States v. Mitchell*, 463 U.S. 206, 225 (1983).

[6] "We have a fiduciary responsibility through agreements made long ago with tribal governments to see that Indians have safe and modern infrastructure. Without these facilities, it is impossible for tribes to compete in the area of economic development." 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (Congressman George Miller speaking on behalf of increased funding for Indian Reservation Roads under the Intermodal Surface Transportation Efficiency Act of 1992).

[7] *See, e.g.*, Department of the Interior Appropriations, Pub. L. No. 97-100, 95 Stat. 1391, 1400 (1981).

Although the construction and improvement of Indian reservation roads are subject to the uniform policies of the Federal Lands Highways Program established under 23 U.S.C. § 204, Congress has differentiated Indian projects from highway construction on non-Indian federal lands. Special provision is made for contracts with Indian tribes and the employment of Indian labor. 23 U.S.C. § 204(b). Funds obligated for Indian road projects must be supplementary to and not in lieu of apportionments to states from the Highway Trust Fund. 25 U.S.C. § 204(c). Under 23 U.S.C. § 204(e) (1988), the Buy Indian Act, 25 U.S.C. § 47 (1988), and the Indian preference provision of the Indian Self-Determination Act, 25 U.S.C. §450e(b), apply. The roads, when completed are administered and maintained by the BIA. 25 C.F.R. § 170.6.

The tribes are responsible for setting the "reservation road priorities and considering the merits of one road project over another." 25 C.F.R. § 170.16(c). The regulations also provide that the tribe may contribute to the cost of the road, so long as such contributions will not cause "undue impairment of the necessary tribal functions." 25 C.F.R. § 170.6a.

B. The Blaze Contracts

In 1983, Congress provided funds from the Highway Trust Fund for the construction of Indian reservation roads.[8] The Department of Transportation and the BIA allocated funds for road construction projects on the Jicarilla Apache Reservation, the Zia Pueblo, the Laguna Pueblo, and the Navajo Reservation (hereinafter, "the Tribes"). None of the Tribes chose to exercise their Self-Determination Act option to assume responsibility for the road projects on their reservations. However, each

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[8] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(a)(3), 96 Stat. 2097, 2099 (1983).

of the Tribes took part in the planning for construction of the roads, and contributed rights-of-way (App. 18a).

The BIA issued bid solicitations for each project, stating that each project was a total set aside for small business 100% Indian-owned and controlled firms.[9] Blaze qualifies as an Indian-owned economic enterprise under the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.* (1988) (App. 28a). Blaze submitted bids on each solicitation. Blaze did not include the New Mexico gross receipts tax in the amounts submitted in its bids (App. 29a). Blaze's four bids were accepted by the BIA, and it entered into contracts with the BIA to construct each project.

New Mexico does not license Blaze as a contractor doing business in the State of New Mexico (App. 29a). During the construction period, Blaze was headquartered in Yakima, Washington but maintained a construction office on the reservations at each contract location (App. 28a). The contracts required Blaze to hire members of each tribe upon whose reservation it was constructing a project (App. 29a). In addition to rights-of-way across tribal lands, the Tribes provided water and base materials needed to complete the construction (App. 29a). Blaze purchased liquid asphalt, and rented machinery from off-reservation businesses in New Mexico. It paid the full amount of New Mexico taxes included in the invoices from its off-reservation suppliers (App. 29a).

On May 9, 1986, after Blaze had been selected to perform the work on each of the projects, the Tax Department informed Blaze by letter that it considered the contracts to be subject to New Mexico's gross receipts tax (App. 29a).

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[9] R., Taxpayer's Exhs. 1, 2, 3 and 4.

C. Proceedings Below

1. The Tax Department Assessment and Determination

New Mexico levies an excise tax (4¾ percent during the relevant period) on the gross receipts of any person engaged in the privilege of doing business in the State. N.M. Stat. Ann. § 7-9-4 (Michie 1978) (App. 40a). It also imposes a compensating use tax (4¾ percent during the relevant period) on the value of property or services acquired in transactions that should have been subject to the gross receipts tax or that were later used in the State. N.M. Stat. Ann. § 7-9-7 (Michie 1978) (App. 40a-41a).[10]

The Tax Department issued an assessment to Blaze on February 18, 1988, seeking a total amount of $291,008.53 for the reporting period between April 1, 1986 and October 1, 1987. This amount consisted of $222,409.55 in gross receipts and compensating taxes, $22,240.95 in penalties and $46,358.03 in interest.

Blaze filed a timely protest pursuant to N.M. Stat. Ann. § 7-1-24 (Michie 1978). On January 23, 1990, following an evidentiary proceeding before a hearing officer, the Tax Department rejected the protest. It reasoned that New Mexico could impose the tax because the constitutional doctrine of intergovernmental immunity no longer applies to state taxes on contracts with federal agencies, citing *United States v. New Mexico,* 455 U.S. 720 (1982). Because the contract was with the United States, not with the Tribes, the Tax Department saw "no logical reason to treat the Taxpayer's receipts in this instance any differently solely because the work was performed on an Indian reservation." (App. 33a).

Turning to the Indian preemption doctrine, the Tax Department determined that *Cotton Petroleum Corp. v.*

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[10] At the time of the transactions in question, the gross receipts tax rate in New Mexico was 4 and ¾ percent (App. 40a). It is now 5 percent (App. 40a).

New Mexico, 490 U.S. 163 (1989) expressed a more rigorous formulation of that doctrine than had prior cases. It found no evidence of a specific congressional intent to preempt in the Indian Self-Determination and Education Assistance Act, the Indian Financing Act, or the Federal Lands Highway Program (App. 35a).[11]

2. *Judicial Proceedings*

a. *The New Mexico Court of Appeals.* On Blaze's appeal from the Tax Department, the Court of Appeals of the State of New Mexico reversed, holding that the state's gross receipts tax was preempted (App. 25a).

The court rejected the State's argument that the issue was controlled by *United States v. New Mexico* because Blaze had contracted with the BIA rather than the Tribes. It noted that as a federal agency, the BIA has a special relationship with the Indian tribes with respect to the performance of governmental functions, economic development and the maintenance and enhancement of tribal sovereignty (App. 20a). The court viewed the BIA as a partner with the Tribes in the performance of the governmental function of improving the reservations' transportation systems and facilitating their economic development.[12]

Applying the preemption analysis required by *Cotton Petroleum*, the court then undertook a detailed examina-

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[11] In particular, it concluded that there was nothing in the Federal Lands Highway Program to indicate that taxes that would apply to construction of national park roads should not also apply to Indian roads (App. 35a).

[12] The court specifically noted that "for purposes of Indian preemption analysis, there is no basis for distinguishing between roads maintained by a tribe and roads maintained by the BIA." (App. 20a, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 n.14 (1980)). The court determined, however, that *Bracker* was not dispositive because, in that case, tribal logging activities, not BIA roads, were the basis of this Court's preemption holding. (App. 22a).

tion of the interests and activities of the Federal Government, the Tribes and the State. The court gave weight to the role of the Tribes in providing the rights-of-way, planning the routes, furnishing water and base materials, and making available a pool of workers from the reservations. It found that "[t]he State, on the other hand, did not attempt to identify any interest, either in the form of a planning function or regulatory responsibilities, in the construction projects or the roads themselves after they were built" (App. 19a), leaving the State with no responsibilities related to the four projects (App. 23a).

The court also concluded that the State taxes burden the federal and tribal interests in improving reservation transportation systems and in fostering the economic well being of tribal members (App. 24a). It expressly held that "if contractors such as Blaze are required to pay state taxes on their road-building activities, the cost per mile of building roads on reservations will increase" and therefore, "fewer roads or smaller portions of roads can be built or improved for the same amount of money." (App. 24a).

The court distinguished this case from *Cotton Petroleum's* determination that state severance taxes on Indian oil production leases were not preempted. It held that in *Cotton Petroleum* the State had been able to demonstrate a regulatory interest in the activity being taxed, and provided services to the tribe and lessees, while no comparable interest had been identified on this record (App. 25a).

b. *The New Mexico Supreme Court.* The Supreme Court of the State of New Mexico reversed the State Court of Appeals' decision. It ruled that under the federal instrumentality doctrine set out in *United States v. New Mexico,* Blaze is not protected from state taxes by the constitutional doctrine of intergovernmental immunity. It further held that the Indian preemption doctrine was

inapplicable because the contracts were not made directly with the Tribes or their members, but with the BIA (App. 6a). It rejected the Court of Appeals' holding that the doctrine applied, determining that the BIA and the Tribes were not in partnership in performing the construction contracts.

In the alternative, the New Mexico Supreme Court held that even if the Indian preemption doctrine applied, the tax on Petitioner was not preempted. It held that this Court's decision in *Cotton Petroleum* had abandoned the requirement in *Bracker* and *Ramah* that a state must identify a regulatory function or service related to the activity being taxed. The court ruled that "*Cotton Petroleum* [had] abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*" (App. 11a). The court therefore found it irrelevant that the State identified no specific services or regulatory functions provided to the activity it was seeking to tax (App. 12a). Instead, the court held that the State's interest in taxing for the common good, *i.e.*, the welfare of the general population of the state, was sufficient to justify its imposition of the tax under the Indian preemption doctrine (App. 12a).

The court also concluded that in light of the findings by the Tax Department, no impairment of tribal interests could be shown because any burdens on tribal interests were indirect (App. 13a-14a). The direct burden of the taxes, it held, fell on the federal government rather than on the Tribes (App. 14a).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

This Court has recognized that when the BIA is providing on-reservation facilities and services to Indian people, it acquires a unique legal status that makes it different from ordinary federal agencies because it is executing the United States' trust responsibility to Indians. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Under the policies and procedures Congress prescribed in the 1975 Self-Determination Act, Indian tribes themselves decide whether particular on-reservation functions or services will be performed by tribal governments and organizations, or by the BIA. When a tribe chooses to let the BIA perform a function, the BIA is effectively providing local government services on behalf of the tribe. Under the scheme of the Self-Determination Act, the nature and purpose of a federally-funded contract for such services is the same whether the contract is awarded by the BIA or the tribe. Therefore, the same principles should govern the liability of the contractor for state taxes, whether the agreement is with the tribe or the BIA.

This Court has also ruled that where the trust responsibility to Indians is involved, applicability of state taxes no longer depends on whether there is a constitutional immunity under the federal instrumentalities doctrine, but on whether particular state taxes must yield to federal policy under the Indian preemption doctrine. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 837-38 (1982).[13] That doctrine requires a particularized balancing of tribal, state and federal interests in light of all congressional policies. *Cotton Petroleum*, 490 U.S. at 176. If the Tribes on whose behalf

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[13] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473 n. 113 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-55 (1973).

the BIA contracted in this case had exercised their self-determination option to award the contracts themselves, the taxes would have been preempted under *Ramah*. Because the contracts were let by the BIA, however, the New Mexico Supreme Court held the Indian preemption doctrine inapplicable. This approach produces disparate tax treatment of tribal and BIA contractors performing the identical function, thereby seriously interfering with the policies and purposes of the Indian Self-Determination Act.[14]

The New Mexico Supreme Court held, in the alternative, that the taxes imposed on Blaze were valid under the Indian preemption doctrine. It interpreted *Cotton Petroleum* as holding that under this doctrine, a state no longer need provide any service or regulatory function to the particular on-reservation activities it is taxing, because a state's general interest in raising revenue is sufficient in itself to establish a supervening state interest. However, this interpretation conflicts with *Cotton Petroleum*'s careful analysis of the state's particularized regulatory role in the activity being taxed in that case. It also conflicts with specific holdings in *Ramah*, 458 U.S. at 845, and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980), not overruled by *Cotton Petroleum*, that a general interest in raising revenue is not a sufficient state interest under the Indian preemption doctrine. This ruling also conflicts directly with the Ninth Circuit's post-*Cotton Petroleum* decision in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (1989), *cert. denied*, 494 U.S. 1055 (1990), which held that a state timber tax is preempted because it "does not fund services that directly relate to the harvesting of timber and is otherwise unconnected with tribal timber activities."

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[14] Petitioner claims only that the Indian preemption doctrine applies to BIA contractors, not that such contractors are constitutionally immune from state taxes under the federal instrumentalities doctrine.

Because the decision by the highest court of New Mexico is binding on all tribunals in that State, and contractors are barred by the Tax Injunction Act [15] from challenging New Mexico's gross receipts tax in federal district court, this Court is the sole forum that can address contractors' challenges to the validity of the tax under the Supremacy Clause.

II. THE INDIAN PREEMPTION DOCTRINE SHOULD APPLY TO STATE TAXATION OF BIA AS WELL AS TRIBAL CONTRACTORS HIRED FOR ON-RESERVATION CONSTRUCTION

A. The Federal Instrumentality Doctrine Does Not Foreclose Application of the Indian Preemption Analysis if BIA's Activity Substantially Impacts Federal Indian Policy

The United States is constitutionally immune from direct taxation by the states. Under the federal instrumentality doctrine of *United States v. New Mexico*, however, a state may tax a contractor hired by a federal agency, unless the contractor is a "constituent part" of the agency. 455 U.S. 720, 740 (1982).

By contrast, whether a state may tax a contractor hired by a tribe (even when the tribe has assumed that function from the BIA and is using the BIA's money) is determined under the Indian preemption doctrine. That doctrine requires a detailed examination of the relevant facts and applicable laws, and a careful balancing of Indian, state and federal interests, to determine whether a state's intrusion into Indian affairs so interferes with federal Indian policy or tribal sovereignty that it must be deemed to have been implicitly preempted by Congress. *Cotton Petroleum* (no preemption of State severance taxes on lessees of Indian mineral rights); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (State taxes on school construction contractor hired by tribal organiza-

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[15] 28 U.S.C. § 1341 (1988).

tion which had taken over the contract award function from the BIA preempted.)

Between these two lines of cases lie contracts for on-reservation construction entered into by the BIA in performance of the United States' fiduciary responsibilities to Indian people because the tribe has chosen not to assume responsibility for awarding the construction contract. Petitioner does not contend that it is immune from state taxes under the principles of intergovernmental immunity. However, given the integral role the BIA and its contractors play in the implementation of federal Indian policy, Petitioner does contend that the Indian preemption doctrine should be applied to determine if the state tax improperly interferes with such policy.

B. The BIA is so Integral to the Federal Indian Trust Responsibility that Indian Preemption Analysis Should Apply

1. *The BIA has Unique Trust Responsibilities Towards Tribes and Individual Indians*

This Court has previously noted that the BIA has a different status and different mission from that of any other federal agency. "[T]he legal status of the BIA is truly *sui generis*." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). One of the factors that makes the BIA unique is its responsibility to provide Indians with services normally provided by local governments until the Indian tribes are ready to assume greater control over their own lives. *Id.* at 552 (citing *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). This is the role the BIA is performing when it awards contracts for the construction of Indian reservation roads. These are Indian roads that are provided as part of the federal government's fiduciary duty to the tribes.[16] That is why the BIA

[16] "The Amendment we are offering is quite simple. It strives to finally provide the Indian people with the necessary level of funding to upgrade *their* deteriorating and inadequate road system." 137

regulations empower the tribes to set the road priorities on their reservations, 25 C.F.R. §§ 170.4a and 170.16(c), and permit them to contribute to the cost of the road, if doing so will not impair tribal functions. 25 C.F.R. § 170.6a. Because the BIA is acting as a surrogate on behalf of the tribe, its contractors should be assessed under the same Indian preemption doctrine this Court has applied to tribal construction contractors.

Further, given the integral role the BIA plays in implementing federal Indian policy, state activities that affect the BIA can, and often do, directly affect the tribe and the individual Indians "whose lives and activities are governed by the BIA in a unique fashion." *Mancari,* 417 U.S. at 554. Therefore, whether a state tax interferes with federal Indian policy cannot be fully determined unless the Indian preemption doctrine is applied to those doing business with the BIA as well as to those doing business with tribes and their members.

2. *Application of the Indian Preemption Doctrine to Tribal Contractors But Not to BIA Contractors Interferes With the Congressional Scheme Established by the Self-Determination Act*

In the Indian Self-Determination Act, Congress constructed a comprehensive scheme to promote tribal self-governance without retreating from its trust responsibilities. Under that scheme, the relationship between the BIA and tribes has become even more intertwined. As a result, state taxation of BIA contractors may not only interfere with federal Indian policy, it may also interfere with tribal sovereignty and self-governance, making application of the Indian preemption doctrine even more essential.

Cong. Rec. S7787 (daily ed. June 13, 1991) (emphasis added). (Senator Pete Domenici speaking on behalf of an amendment to increase funding for the Indian Reservation Roads program). *See also* statement by Congressman George Miller, *supra,* n.6.

In the Self-Determination Act, Congress granted to tribal governments the self-governing authority to decide for themselves who shall provide trust services on their reservations, such as the award of contracts for the construction of Indian reservation roads. Under one option, the tribe lets the BIA award the road construction contract directly, pursuant to the procedures set out at 25 C.F.R. Part 170 and the Federal Acquisition Regulations, 48 C.F.R. §§ 1401-99 (1993). In such cases, the tribes may exercise their self-determination rights by participating in the planning of the project (25 C.F.R. § 271.4(f)), as happened in this case (App. 18a).

Under a second option, the tribe notifies the BIA that it wishes to assume responsibility for awarding the road construction contract. The Secretary and the tribe then enter into a separate self-determination contract which provides for the transfer to the tribe of funds for and control over that road project. The tribe then awards and administers the construction contract itself.[17]

The decision on which method to use rests solely with the tribe, as an exercise of its self-determination rights. 25 C.F.R. § 271.4(d). The decision not to assume responsibility for the project and to let the BIA award the construction contract is as much an act of self-determination as is assuming responsibility. 25 C.F.R. § 271.4(d). Likewise, if, after assuming responsibility for the activity, the tribe concludes that the task is too burdensome, it has the right to return or "retrocede" that responsibility to the BIA. 25 C.F.R. § 271.71 (see discussion, *supra*, p. 4).

The BIA Self-Determination regulations also recognize that the extent to which individual tribal governments are able to participate in the planning, conduct and adminis-

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[17] Until 1994, a tribe was required to comply with the same Federal Acquisition Regulations as the BIA. The 1994 amendments to the Self-Determination Act relax this requirement. The Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4253.

tration of road construction programs varies with the size and resources of the Indian community involved and the experience of tribal officials in administering such programs. Indian governments frequently lack the human and economic resources, or the business experience necessary to assume administration of contracts heretofore administered by the BIA. To avoid pushing a tribe into assuming the federal government's on-reservation trust functions before the tribal government decides it is ready to do so, the regulations provide that the BIA is to impose no incentives or disincentives that could drive that decision. 25 C.F.R. § 271.4(e). The federal government has thus committed itself to complete neutrality in order to avoid influencing a tribe when it chooses among its self-determination options.

Thus, under the Act, Congress has established a comprehensive scheme for promoting tribal self-determination. As part of that scheme, it has made the roles of the BIA and the tribe largely interchangeable, so that BIA management and tribal management of a road construction project are virtually two sides of the same coin. In fact, on any roads project, responsibility for the project can move from the BIA to the tribe and back to the BIA. 25 C.F.R. § 271.71.

Congress has, in effect, made the BIA an optional resource for the tribes. The fact that the BIA has awarded and is managing a particular road construction contract results from an explicit or implicit governmental decision, made solely by the tribe, not to perform the function itself. This decision is specifically recognized as an exercise of self-determination. By incorporating the neutrality principle discussed *supra*, this federal policy leaves no room for non-tribal influences to tilt the tribes' decision-making in one direction or the other.

A state tax on a BIA contractor injects the state into the middle of this comprehensive scheme. Further, in light of the existing case law, the state's intrusion signifi-

cantly upsets the careful balance Congress has struck between the promotion of self-government, and assurance to tribes that the federal trust responsibility continues to give them the right to receive services directly from the BIA when they so choose. 25 U.S.C. § 450n(2).

It is now well established that state governments may not tax tribal governments and Indian organizations engaged exclusively in transactions for the benefit of tribal members on the reservation,[18] nor may states tax on-reservation contractors in direct privity with Indian tribes.[19] For example, in *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), an Indian school board assumed the BIA's construction functions, so that the Board, rather than the BIA, awarded the federally-funded contract for construction of an on-reservation school. Applying the Indian preemption analysis, this Court held that the contractor was exempted from State taxation.

Thus, if Zia and Laguna Pueblos, the Jicarilla Apaches or the Navajo Nation had assumed administration of the BIA road construction contracts involved here and awarded the identical contracts, Petitioner would not have been subject to the New Mexico gross receipts tax. Yet solely because the Tribes chose to let the BIA award the contracts, the New Mexico Supreme Court's decision makes Petitioner subject to that tax.

In light of the New Mexico Supreme Court's decision, BIA contractors will henceforth include state taxes in calculating their bids on BIA-awarded contracts. In order

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[18] *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

[19] *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

to preserve limited funds appropriated to fulfill the federal trust responsibility, tribes will be under pressure to take over the function of contracting for such construction, whether they are fully ready to do so or not. Otherwise, they will get fewer miles of roads and smaller hospitals and schools when the BIA awards the contract, because a substantial percentage of the funds will be diverted for state taxes. Since the annual appropriations for Indian construction projects is approximately $655 million a year,[20] the impact is substantial.

Unlike situations considered under the federal instrumentality doctrine, here the effect on federal interests goes far beyond that of just increasing the cost to the U.S. Treasury. The state tax becomes a significant and disruptive factor in the federal government's self-determination policy. BIA and tribal award of road projects are no longer interchangeable. The state tax burdens one of the tribe's options, which conflicts with a federal policy that tribal decision-making be free of outside influences. State tax consequences will also confuse the situation when a tribe seeks to retrocede a contract to the BIA.

These kinds of state burdens may or may not be sufficient to justify preemption in a particular case; that will depend on a court's balancing of the various interests under the Indian preemption doctrine. However, this case demonstrates how state actions in regard to BIA contractors substantially affect not just federal Indian policy, but tribal sovereignty and self-governance as well. Unless Indian preemption analysis is applied to state taxation of BIA contractors, the courts will never have the opportunity to determine if such burdens are inconsistent with Congressional intent and thus preempted.

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[20] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, 107 Stat. 1379, 1393 and 1409 (1993); Intermodal Surface Transportation Efficiency Act of 1991, 105 Stat. 1914, 1919 (1991).

C. There Is No Support in the Caselaw or Underlying Policy for Threshold Criteria That Apply the Indian Preemption Analysis Only to Cases in Which the Tribe is a Direct Party

The New Mexico Supreme Court concluded that the Indian preemption doctrine is to be applied only when a tribe or an individual Indian is a direct party. It did so on the grounds that all of this Court's Indian preemption decisions involved "cases in which contracts were made or business was conducted directly with Indian tribes or tribal members." (App. 6a).

In so holding, the New Mexico Court has created threshold criteria for the Indian preemption doctrine that have no support in the caselaw. There is no language in any of the Court's decisions indicating that the Indian preemption doctrine applies only when the tribe or tribal member is a party to the contract. Nor is such a threshold requirement consistent with the purposes of the doctrine. The preemption analysis is "essentially legislative in character," [21] designed to determine whether a particular state action is inconsistent with Congress' intent. There is no room for artificial threshold criteria in such an inquiry. Far from adopting any mechanically applied threshold criteria, this Court has said that to ascertain Congress' intent, there must be a "flexible," "sensitive," "particularized" analysis of the federal, tribal and state interests involved.[22] This Court should address the New Mexico court's mischaracterization of the Indian preemption doctrine.

The principles for determining the validity of state taxation of on-reservation contractors are of substantial public importance. They concern not only the 21 tribal govern-

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[21] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (quoting *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-66 (1949)).

[22] *Id.* at 176.

ments and the 87,000 Indians in New Mexico's pueblos, reservations and trust lands, but all of the nation's Indian tribal governments and their peoples. In *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 842 (1982), this Court concluded that the burden of state taxation of a contractor fell directly on the tribe because such taxes depleted federal funds available for the construction of Indian schools. *See Cotton Petroleum*, 490 U.S. at 183-85. Similarly, the limited funding allocated for construction of Indian facilities on particular reservations will, as the New Mexico Court of Appeals recognized, be diminished if BIA contractors must include such taxes in their bids.

The proper standard for the taxation of receipts from those contracts is also of immediate importance to the states, which understandably wish to exploit federal funds as a source of revenue. In addition, the question bears directly on the federal trust responsibility, for federal agencies like the BIA must administer the limited funds allocated to construction for the benefit of Indians. Therefore, the applicability of the Indian preemption analysis to state taxation of BIA contractors for on-reservation construction is a question that merits prompt resolution by this Court.

III. UNDER THE PREEMPTION ANALYSIS IN *COTTON PETROLEUM*, THE STATES ARE PREEMPTED FROM IMPOSING GROSS RECEIPTS TAXES ON BIA CONTRACTORS THAT CONSTRUCT FACILITIES ON RESERVATIONS FOR THE BENEFIT OF INDIANS

Cotton Petroleum restated the general principles governing Indian preemption analysis. First, tribal sovereignty serves as a backdrop to the examination of Congress' intent. Second, preemption principles developed in non-Indian cases are not applicable, nor is the analysis "controlled by 'mechanical or absolute conceptions of state

or tribal sovereignty.' " [23] Rather, the courts must undertake a particularized review of the facts, legislation, and the relevant state, federal, and tribal interests. Third, the broad policies of the relevant legislation and the history of tribal independence are directly relevant. Fourth, Congress need not expressly declare its intent for preemption to occur. Finally, ambiguities in federal legislation affecting Indians are typically "resolved in favor of tribal independence." [24]

Carefully applying these principles, this Court held in *Cotton Petroleum* that New Mexico's mineral severance tax applied to production from oil and gas leases on an Indian reservation. The Court first determined that the Indian Mineral Leasing Acts of 1927 and 1938 were consistent with a congressional purpose to permit state taxation of non-tribal mineral lessees. It then compared the interests of the State and the Tribe. As to the State, the record showed that New Mexico, in fact, provided substantial support and regulatory services to the lessees' operations being taxed. As to the Tribe, the record showed that no economic burden fell on the Tribe, and that any adverse effects on oil and gas development by Indian tribes were marginal, insubstantial and indirect. The Court concluded that the most significant difference between the facts in *Bracker* and *Ramah,* and those in *Cotton Petroleum* was that, in the latter, the State had a significant regulatory role in oil and gas development on the reservation. Both of the earlier cases, however, ". . . involved complete abdication or noninvolvement of the State in the on-reservation activity." [25]

The New Mexico Supreme Court did not apply the analysis of *Cotton Petroleum* here; it changed it. In the

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[23] *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176 (1989) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1989)).

[24] *Id.* at 176-77.

[25] *Id.* at 185.

instant case, as in *Ramah* and *Bracker*, "the State was 'unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on bureau and tribal roads within the reservation.' " [26] To avoid this deficiency, the State Supreme Court ruled that *Cotton Petroleum* had intentionally modified the elements of Indian preemption analysis by dispensing with the requirement in *Bracker* and *Ramah* that the State identify a regulatory function or service related to the activity being taxed (App. 10a).

Nothing in *Cotton Petroleum* supports that conclusion. To the contrary, the Court went to great lengths to distinguish the facts in *Cotton Petroleum* from those in *Ramah* and *Bracker* by describing the specific regulatory functions and services the State provided to the particular activity it was seeking to tax.

Moreover, the State Supreme Court has held that under *Cotton Petroleum*, the State's general interest in raising revenue for the common good is sufficient to sustain a tax (App. 12a). However, in both *Bracker*, 448 U.S. at 151, and *Ramah*, 458 U.S. at 845, this Court expressly ruled that a generalized state interest in raising revenue is insufficient to justify State taxation of on-reservation activity in which the State provides neither regulation nor service. Nothing in *Cotton Petroleum* overturned those holdings.

If the New Mexico Supreme Court's ruling is permitted to stand, a state will have a valid interest in every case under the Indian preemption analysis, since every state has a generalized interest in raising revenue. Clearly, the decision in *Cotton Petroleum* does not support the conclusion that states are henceforth relieved of any need to demonstrate their particularized interests as part of the Indian preemption analysis. To the contrary, in that decision the Court analyzed the State's particularized interest

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[26] *Ramah*, 458 U.S. at 184 (quoting *Bracker*, 448 U.S. at 150).

at great length. Therefore, this Court should grant *certiorari* in order to correct this significant undercutting of the preemption analysis.

The New Mexico court's misreading of *Cotton Petroleum* also conflicts directly with the federal court of appeal's ruling in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 449 U.S. 1055 (1990). In that case, the Ninth Circuit held that *Cotton Petroleum* had reaffirmed the basic principle of *Bracker* and *Ramah* that a state's general interest in revenue collection is insufficient to outweigh specific federal and tribal interests, where the state tax bears no relationship to the on-reservation activity being taxed.[27]

The burdens and inconsistencies outlined above must be considered in light of the fact that the State had no role whatsoever in the planning, construction or regulation of on-reservation roads. Blaze built these roads for the benefit of the tribes, with tribal labor, using tribal resources, on tribal rights-of-way. These factors demonstrate that the gross receipts tax is preempted by federal Indian laws, regulations and policies. The New Mexico Supreme Court sought to escape such a result by a misinterpretation of *Cotton Petroleum* that radically alters the elements of Indian preemption analysis as applied to state taxation of on-reservation activity.

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[27] 881 F.2d at 660-61. The requirement that the state tax bear some relationship to the activity being taxed does not mean that there must be a proportional quid pro quo between state on-reservation services and the amount of tax, but only that the state play a role in regulating or otherwise providing services to the on-reservation activity. The relationship requirement defines a threshold the state may cross by showing that it provides significant regulatory or other support for the activity being taxed. *See Cotton Petroleum*, 490 U.S. at 185.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted,

Respectfully submitted,

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January 17, 1995

APPENDIX A

[Filed Oct. 18, 1994]

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 21,551

BLAZE CONSTRUCTION CO., INC.,
an Oregon corporation,
Plaintiff-Respondent,

vs.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Defendant-Petitioner,

Consolidated With:

No. 22,132

ARCO MATERIALS, INC.,
Petitioner-Respondent,

vs.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent-Petitioner,

Original Proceeding on Certiorari

OPINION

BACA, Chief Justice.

This proceeding arises from two consolidated cases decided in the Court of Appeals, *Blaze Construction Co. v. New Mexico Taxation and Revenue Department*, —— N.M. ——, 871 P.2d 1368 (Ct. App.), *cert. granted*, —— N.M. ——, —— P.2d —— (1993), and a third case in the same Court, *Arco Materials, Inc. v. New Mexico Taxation and Revenue Department*, —— N.M. ——, —— P.2d —— [No. 14,729, filed April 27, 1994], *cert. granted*, —— N.M. ——, —— P.2d —— (1994). We granted certiorari in these cases and consolidated them to consider whether federal law preempts imposition of New Mexico gross receipts tax on a contractor's receipts when the contractor enters into an agreement with the Bureau of Indian Affairs ("the BIA") to construct or provide materials for roads built on several New Mexico Indian reservations. In each case the Court of Appeals held that the gross receipts tax could not be imposed. We reverse the Court's decisions and hold that federal law did not preempt imposition of the tax.

I.

The following facts are pertinent to this proceeding. In *Blaze*, Blaze Construction Company ("Blaze"), an Oregon corporation whose owner is a member of the Blackfeet tribe in Oregon, contracted with the BIA to build roads on several New Mexico Indian reservations.[1] The roads were to be built pursuant to the Federal Lands Highways Program, 23 U.S.C. § 204 (1988).[2] Each tribe helped plan the route the roads would traverse across

[1] The contract called for roads to be built on the Jicarilla Apache Reservation, the Navajo Reservation, the Laguna Pueblo, and the Zia Pueblo.

[2] The Federal Lands Highways Program provides federal funding to construct and improve Indian reservation roads. 23 U.S.C. § 204(b).

tribal land and also provided water and some materials for the construction. Blaze was required to hire local reservation residents to work on the road construction.

In April 1986 Blaze requested a ruling from the New Mexico Taxation and Revenue Department ("the Department") on whether the construction projects were taxable. The Department issued a letter ruling in May 1986, informing Blaze that the projects were subject to the tax. Blaze did not contest this ruling but declined to pay the tax. In February 1988 the Department assessed Blaze gross receipts tax in the amount of $222,401, plus penalty and interest amounting to $68,500.

In March 1988 Blaze filed an administrative appeal from the Department's assessment. The Department held a hearing in October 1989 and in January 1990 issued a final decision upholding he validity of the assessment. Blaze appealed this decision to the Court of Appeals.

The Court of Appeals filed an opinion in September 1993, reversing the Department's ruling. The Court rejected the Department's argument that Blaze was a federal government contractor subject to state taxes under *United States v. New Mexico,* 455 U.S. 720 (1982). The Court applied the Indian preemption doctrine and held that the state taxes in question were preempted with respect to construction of roads on tribal land. *See* —— N.M. at ——, 871 P.2d at 1373.

The Court of Appeals addressed the same issue in *Arco.* In that case, Arco Materials, Incorporated ("Arco"), sold paving materials to the BIA for road construction on Navajo lands. The Department assessed gross receipts tax and penalties, and disallowed certain deductions. Arco challenged the assessment of the taxes and penalties and the disallowance of deductions by appealing to the Court of Appeals. Relying on its opinion in *Blaze,* the Court of Appeals reversed the disallowance of deductions and the assessment of penalties. We granted certiorari in

both cases and consolidated them because they presented identical issues.

II.

On appeal, we address whether federal law preempts the imposition of New Mexico gross receipts tax on contractors' receipts when the contractors have entered into agreements with the BIA to either construct or provide materials for roads built on Indian land. The *Blaze* case presents a threshold issue of whether Blaze, an Indian-owned corporation performing work solely on an Indian reservation, is per se exempt from state taxation. We conclude that Blaze is not automatically exempt from state taxation. In *Washington v. Confederated Tribes,* 447 U.S. 134, 160-61 (1980), the United States Supreme Court upheld a state's power to levy taxes on Indians who lived on a reservation but had no tribal affiliation with the particular reservation Indians among whom they lived:

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act . . . does not demonstrate a congressional intent to exempt such Indians from State taxation. . . .
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> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation . . . We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

447 U.S. at 161.

In this case, Blaze is owned by a member of the Blackfeet tribe. The road construction is taking place on Indian reservations other than the Blackfeet reservation.

Under *Washington,* Blaze is not per se exempt from paying taxes for the road construction.

We note that two opinions of our Court of Appeals have been read to stand for the proposition that "tribal affiliation is of no moment when determining the taxability by states of an Indian on a reservation." *Fox v. Bureau of Revenue,* 87 N.M. 261, 263, 531 P.2d 1234, 1236 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied,* 424 U.S. 933 (1976), *overruled by New Mexico Taxation and Revenue Department v. Greaves,* 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993); *see also Eastern Navajo Indus., Inc. v. Bureau of Revenue,* 89 N.M. 369, 373-74, 552 P.2d 805, 809-10 (Ct. App.) (suggesting that similar rule applies in corporate context), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976), *cert. denied,* 430 U.S. 959 (1977). Both *Fox* and *Eastern Navajo* were decided prior to *Washington,* and we disapprove any language in these cases to the extent that it can be read as inconsistent with our holding today.

A.

We next address whether the Court of Appeals erred by deciding that the Indian preemption doctrine applied in *Blaze* and in *Arco.* Citing *United States v. New Mexico,* the Department argues that the state may tax entities that contract with the federal government. The Department asserts that Blaze and Arco contracted with the federal government by contracting with the BIA and are thus liable to pay state taxes without the necessity of applying the Indian preemption doctrine to determine whether the tax is preempted.

The Court of Appeals disagreed with the Department's argument and concluded that the BIA is "a partner in the tribes' performance of the integral governmental functions of improving the transportation system and facilitating economic development." —— N.M. at ——, 871 P.2d at 1370. The Court of Appeals held that "[u]nder these circumstances . . . the fact that Blaze's contracts

. . . were with the BIA, rather than the tribes, has no effect on the necessity for performing [Indian] preemption analysis." —— N.M. ——, 871 P.2d 1370-71. We disagree with this holding and conclude that the Indian preemption doctrine is not applicable to the facts of these cases.

As the Department correctly points out, the U.S. Supreme Court has only applied the Indian preemption doctrine in cases where contracts were made or business was conducted directly with Indian tribes or tribal members. *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 166 (1989) (applying doctrine where state imposed severance taxes on production of oil and gas on reservation land); *Ramah Navajo Sch. Bd. v. Bureau of Revenue,* 458 U.S. 832, 834 (1982) (applying doctrine where state imposed gross receipts tax on receipts that non-Indian construction company, hired to build reservation school, received from tribal school board); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 137-38 (1980) (applying doctrine where state attempted to impose motor carrier license and use fuel taxes to company engaged in commerce on Indian reservation); *Central Mach. Co. v. Arizona Tax Comm'n,* 448 U.S. 160, 161 (1980) (applying doctrine where state taxed sale of farm machinery to Indian tribe); *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 165 (1973) (applying doctrine where state imposed personal income tax on reservation Indians who derive entire income from reservation sources); *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 685-86 (1965) (applying doctrine where retail trading post was doing business with Indians on Navajo Reservation). In the cases at bar, Blaze and Arco contracted directly with the BIA, an agency of the federal government, rather than with an Indian tribe or with individual tribal members. Because Blaze and Arco contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze

and Arco are subject to state taxes, just as any other federal government contractor would be.[3] *See New Mexico,* 455 U.S. at 735 & 741.

In *Blaze,* the Court decided that *United States v. New Mexico* did not apply. In so holding, the Court of Appeals conceded that the BIA was a federal agency. Nonetheless, the Court decided that it was necessary to apply Indian preemption analysis because the agency "ha[d] a special relationship with the Indian tribes" and, in essence, was "a partner in the tribes' performance of . . . integral governmental functions" such as road building. — N.M. at —, 871 P.2d at 1370. We are unpersuaded by this rationale. The BIA is not a partner or agent of an Indian tribe for the purpose of entering into agreements with contractors to construct roads on Indian land. To equate Indian tribes and the BIA in this way ignores the fact that tribal governments have retained an element of sovereignty separate and distinct from the federal government. *See Bracker,* 448 U.S. at 142 (recognizing that while Indian tribes do not recognize full attributes of sovereignty, they nonetheless have power to govern their own internal and social relations); Felix S. Cohen et al., *Handbook of Federal Indian Law* 232 (Rennard Strickland & Charles F. Wilkinson eds., 1982) (noting that Indian tribes have consistently been recognized as separate

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[3] The *New Mexico* case held

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities . . . . This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty," by preventing the States from laying demands directly on the Federal Government.
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> . . . .
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> . . . [Consequently,] [a]llowing the States to apply use taxes to [entities contracting with the federal government] does not offend the notion of federal supremacy.

455 U.S. at 735 & 741 (citations omitted).

independent political communities that "'exercise powers of self government"). While the BIA acts in an administrative capacity on the tribe's behalf, it is not synonymous with the tribe; it exercises federal, rather than tribal, authority when entering into contracts for road construction on tribal land. We hold that Court of Appeals erred in concluding that the BIA acted as a tribal partner when contracting for the construction of the roads and in applying the Indian preemption doctrine to the instant cases.

B.

Although we hold that the Court of Appeals erred in deciding that application of the doctrine was necessary, we address whether the Court misapplied the doctrine. The Department argues that the Court of Appeals erred because it relied on the "balancing of interests" approach from *Bracker* and *Ramah* rather than on the "legislative intent" approach in *Cotton Petroleum* that allegedly replaced the "balancing of interests" approach. We do not agree with the Department that *Cotton Petroleum* supplanted *Bracker* and *Ramah* with a new test, although we do believe that *Cotton Petroleum* modified the *Bracker/Ramah* test.

To understand the current Indian preemption test, it is helpful to examine the doctrine. The historical development of the Indian preemption doctrine began to take shape in 1965, when, in *Warren,* the Court addressed whether the State of Arizona could levy a 2 percent tax on the gross proceeds of sales or gross income of a retail trading business operating on the Navajo Indian Reservation in Arizona. 380 U.S. at 685-86. In holding that the tax could not be imposed, the Court relied on the pervasive effect that federal legislation and regulations had over Indian trading:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in

> hand that no room remains for state laws imposing additional burdens upon traders. . . .
>
> And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Id. at 690-91. Thus, in its early stages the Indian preemption doctrine relied on the pervasiveness of federal statutes and regulations when determining whether a state tax was preempted.

The doctrine evolved further in 1973, when the Court decided *McClanahan.* In that case, the State of Arizone tried to impose a personal income tax on Indians who derived their entire incomes from reservation activities. 411 U.S. at 165. Consistent with *Warren,* the Court held the tax invalid because it "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." *Id.* The Court considered the historical notion of Indian sovereignty, stating that " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history,' " *id.* at 168 (quoting *Rice v. Olson,* 324 U.S. 786, 789 (1945)), "[and] provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172.

The Court developed the doctrine further in *Bracker* and *Ramah.* In *Bracker,* the Court noted that "congressional authority and the 'semi-independent position' of Indian tribes have given two independently related barriers to the assertion of state regulatory authority over tribal reservations and members," 448 U.S. at 142. State regulatory authority "may be pre-empted by federal law" or by " 'the right of reservation Indians to make their own laws and be ruled by them.' " *Id.* (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)). The Court articulated a three-part "balancing of interests" test, stating that

the determination of whether an exercise of state authority was preempted "called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. *Ramah* reaffirmed the principles articulated in *Bracker* and, applying those principles, held preempted a state gross receipts tax on the revenue a non-Indian construction company received for the construction of a school on a reservation. 458 U.S. at 834.

In *Cotton Petroleum*, the case that the Department claims changed the test articulated in *Bracker* and *Ramah*, the Court addressed whether the State of New-Mexico could impose severance taxes on the production of oil and gas "by non-Indian lessees of wells located on the Tribe's reservation." 490 U.S. at 166. The Court reviewed the principles of *Bracker* and *Ramah* but held that the tax was not preempted. The Court noted that "[u]nder current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Id.* at 175. The Court gave considerable attention to the legislative history underlying the relevant congressional acts and concluded that "there is . . . simply no history of tribal independence from state taxation of [oil and gas leases] to form a 'backdrop' against which [the legislation] must be read." *Id.* at 182.

After studying the cases giving rise to the Indian preemption doctrine, we disagree with the Department that the United States Supreme Court abandoned the three-part balancing test articulated in earlier cases when it decided *Cotton Petroleum*. The Court applied the balancing test but reached a different result based upon factual distinctions between *Cotton Petroleum* and the earlier cases of *Bracker* and *Ramah*. *See Cotton Petroleum*, 490 U.S. at 183-86. *Cotton Petroleum* did, however, modify the three-part balancing test in certain respects. We hold that the Court of Appeals erred by not

taking into account these modifications in applying the three-part test in *Blaze* and *Arco*.

At the outset, we note that we agree with several points made by the Court of Appeals at the beginning of its discussion of the application of the Indian preemption doctrine. We agree that when "deciding whether state taxation of on-reservation activity has been preempted, we look primarily at congressional intent" and that our nation's history of tribal sovereignty provides a necessary backdrop to the analytical process. —— N.M. at ——, 871 P.2d at 1371 (citing *Cotton Petroleum*, 490 U.S. at 176). The Court of Appeals correctly concluded that although "the Indian Financing Act and other federal statutes evince a federal interest in encouraging tribal self-sufficiency and promoting economic development," this by itself is insufficient for finding preeemption. *Id.* The Court of Appeals concluded that balancing state, federal, and tribal interests was necessary. However, the Court of Appeals erred in applying the "balancing of interests" test.

The Court first erred by holding that the state gross receipts tax was preempted because "the State has identified absolutely no interest in the [road construction] activity." *Id.* As part of the preemption analysis, *Bracker* and *Ramah* both held the state must identify a regulatory function or service performed that would justify the tax. *Ramah* at 458 U.S. at 843-44; *Bracker*, 448 U.S. at 150. Both cases held that the state's general interest in raising revenue through taxes was not sufficient justification for imposing the tax. *Ramah*, 458 U.S. at 845; *Bracker*, 448 U.S. at 150. However, *Cotton Petroluem* abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*. In *Cotton Petroleum*, the Court rejected the corporation's argument that "tax payments by reservation lessees far exceed[ed] the value of services provided by the State to the lessees." 490 U.S. at 189. The Court noted that "the relevant services provided by the State include those that are available to the lessees

and the members of the Tribe off the reservation as well as on it." *Id.* The Court explained that taxation is primarily used to raise revenue for the common good:

> "[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity . . . . 'Nothing is more familiar in taxation than the imposition of tax upon a class or upon individuals who enjoy no direct benefit from its expenditure . . . .
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' "

Id. at 190 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 491, n.21 (1987) (quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 521-23 (1937) (citations and footnote omitted))).

Applying *Cotton Petroleum* to *Blaze* and *Arco,* we conclude that it was irrelevant that the state did not identify specific services or regulatory functions provided in exchange for taxes collected. Taxes are not imposed in exchange for services provided. Instead, taxes are a means of distributing the cost of government among the general population, including its Indian citizens. The state thus had an interest in taxing for the common good —i.e., the welfare of its entire populace, Indian and non-Indian alike. We hold that the interest in raising revenue was sufficient to justify levying the gross receipts tax on Blaze and on Arco. We hold that the Court of Appeals erred by disregarding *Cotton Petroleum* and holding that

state taxes must be directly linked to a state interest in the activity being taxed.

The Court of Appeals also erred by holding that the gross receipts tax was preempted because the tax "indirectly place[d] a burden on the federal and tribal interests in improving the transportation system on reservations and in fostering the economic well-being of tribal members." —— N.M. at ——, 871 P.2d at 1372. The Court reached this conclusion because it found that if contractors were required to pay state taxes for federal road-building projects on an Indian reservation, "the cost per mile of building roads on reservations [would] increase . . . [and] fewer roads or smaller portions of roads [would] be built or improved for the same amount of money." *Id.* The Court also found that the taxes would leave "less money available with which to pay wages to tribal members working on the road projects." *Id.*

We conclude that the Court of Appeals erred by using these facts to justify its conclusion that the state gross receipts tax was preempted. First, the Court's factual findings contradict the findings of the Department, which, after hearing the evidence, found no showing that the tax impaired tribal interests. It is well established that an appellate court will not find facts on appeal. *See Western Bank v. Fluid Assets Dev. Corp.*, 111 N.M. 458, 460, 806 P.2d 1048, 1050 (1991). In this case the Court of Appeals violated this principle by finding "commonsense facts" that directly contradicted the findings of the Department. Second, even were we to assume that the facts found by the Court of Appeals were true, these facts would not justify preemption under *Cotton Petroleum.* In that case the Supreme Court held that indirect, insubstantial, or marginal burdens on tribal interests do not support a claim that a state tax is preempted. 490 U.S. at 186-87. As the Court of Appeals conceded in *Blaze*, any burdens on tribal interests caused by the state

taxation of contractors is indirect, "unlike a situation in which the tribe's own economic activity is being taxed."[4] —— N.M. at ——, 871 P.2d at 1372. Under *Cotton Petroleum*, this indirect burden was insufficient to preempt the state gross receipts tax.

III.

In conclusion, we hold that the Court of Appeals misapplied the Indian preemption doctrine, as modified by *Cotton Petroleum*. We reverse the Court's decision in *Blaze* and reinstate the Department's decision and order assessing taxes, penalties, and interest against Blaze in the total amount of $291,008.53. In addition, we reverse the Court's decision in *Arco* and reinstate the Department's decision disallowing deductions for sales of construction materials to the BIA and assessing penalties for the failure to pay taxes on the sales.

IT IS SO ORDERED.

/s/ Joseph F. Baca
JOSEPH F. BACA
Chief Justice

WE CONCUR:

/s/ Seth D. Montgomery
SETH D. MONTGOMERY
Justice

/s/ Gene E. Franchini
GENE E. FRANCHINI
Justice

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[4] The BIA, rather than the tribes, made the financial contributions to the road projects, and the burden of the taxes thus fell upon the federal government.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Mandate No. 21,551

TO THE Taxation & Revenue Department, GREETINGS:

WHEREAS, in cause styled *In the Matter of the Tax Liability of Blaze Construction Company,* the hearing officer entered a decision and order imposing the New Mexico gross receipts tax on the contractor's receipts pursuant to an agreement with the Bureau of Indian Affairs; and

WHEREAS, the decision and order were afterwards brought by the contractor into the New Mexico Court of Appeals whereupon an opinion was entered on September 2, 1993, reversing the decision and order of the hearing officer; and

WHEREAS, the cause was afterwards brought by the Taxation & Revenue Department into this Court by petition for writ of certiorari, which petition was granted on November 1, 1993, whereupon an opinion was entered on October 18, 1994, reversing the New Mexico Court of Appeals and affirming the decision and order of the hearing officer.

NOW, THEREFORE, this cause is remanded to you for further proceedings, if any, consistent and in conformity with the opinion of this Court.

WITNESS, The Hon. Joseph F. Baca, Chief Justice of the Supreme Court of the

State of New Mexico, and the seal of said Court this 3rd day of November, 1994.

/s/ Kathleen Jo Gibson
KATHLEEN JO GIBSON
Chief Clerk of the
Supreme Court of the
State of New Mexico

(SEAL)

APPENDIX C

[Filed Sep. 2, 1993]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 12,120

BLAZE CONSTRUCTION CO., INC.,
an Oregon Corporation,
Plaintiff-Appellant,
vs.
THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Defendant-Appellee.

No. 12,119

BLAZE CONSTRUCTION CO., INC.,
an Oregon Corporation,
Plaintiff-Appellant,
vs.
THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, GAIL REESE, Secretary of the Taxation and Revenue Department, and GERALD B. RICHARDSON, Hearing Officer,
Defendants-Appellees.

Appeal from the Taxation and Revenue Department
of the State of New Mexico
GERALD B. RICHARDSON, Hearing Officer

OPINION

CHAVES, Judge.

These cases present the question of whether the State of New Mexico, which played no role in the construction, maintenance, or regulation of certain roads built entirely on Indian reservations, may nevertheless impose gross receipts taxes upon the contractor who built the roads. We need not decide whether the contractor, an Indian entity owned by an Indian who is not a member of the tribes for whom the reservations were set aside, is automatically exempt from state taxation. We hold that the fact that the road construction was funded through the Bureau of Indian Affairs (BIA) and was administered by a contract between the BIA and the contractor, rather than between the tribes and the contractor, does not preclude application of a pre-emption analysis to the taxation question. Applying such an analysis to the facts of this case, we hold that the taxes in question may not be imposed by the State.

FACTS

Blaze Construction Company Inc., (Blaze) is an Indian-owned company, whose owner is a member of the Blackfeet tribe. Blaze contracted with the BIA to build roads on the Jicarilla Reservation, Zia Pueblo, Laguna Pueblo, and Navajo Reservation. The roads were built on rights-of-way provided by each tribe or pueblo (for ease of reference, this opinion subsequently refers to the tribes and pueblos simply as tribes, and to the reservations and pueblos simply as reservations). The tribes were involved in planning the route of each road across tribal land, and provided water and base materials needed for the construction projects. Blaze was required to hire local reservation residents as laborers for each project, and each tribe provided the services of a labor office to give Blaze a pool of workers from which to draw and to monitor compliance with tribal labor laws. Most of Blaze's em-

ployees for each project were Indians residing on the respective reservation upon which the road was being constructed. The State, on the other hand, did not attempt to identify any interest, either in the form of a planning function or regulatory responsibilities, in the construction projects or the roads themselves after they were built. The State did not license Blaze as a construction contractor.

DISCUSSION

Blaze's Exemption from Taxation as an Indian-owned Entity

Blaze contends that, since it is an Indian entity and the projects were performed solely on reservations, it is automatically exempt from state taxation. *See Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). Blaze argues that it does not matter that its owner was not a member of any of the tribes upon whose reservations the roads were constructed. The merits of this argument are doubtful. *See Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 161 (1980); *Duro v. Reina,* 495 U.S. 676, 686-87 (1990); *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985, 1990 (1993); *but see Fox v. Bureau of Revenue,* 87 N.M. 261, 531 P.2d 1234 (Ct. App. 1975), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975). Because of our disposition of the other issues in this appeal, however, we need not decide this point.

The Effect of BIA, Rather than Tribal, Involvement in the Contracts

The State argues that Blaze contracted with the BIA, not the tribes. Since federal government contractors may be subjected to state taxes, *see United States v. New Mexico,* 455 U.S. 720 (1982), the State maintains that the tax on Blaze's activities was permissible and no pre-

emption analysis need be performed. We disagree. The BIA may be a federal agency, but it is a federal agency that has a special relationship with the Indian tribes involved in this case. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980) (describing BIA involvement in tribal business enterprises such as logging). The BIA assists tribes in the performance of governmental functions, in the economic development of their lands, and in their attempts to maintain and enhance tribal sovereignty. In fact, the Supreme Court has specifically stated that for purposes of an Indian preemption analysis, there is no basis for distinguishing between roads maintained by a tribe and roads maintained by the BIA. *Id.* at 148 n.14.

We note also that, in describing and applying the test applicable to pre-emption cases such as this one, the Supreme Court has stated that an analysis of the state, tribal, and federal interests in the activity, not simply the state and tribal interests, is necessary. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Heavy federal involvement in an activity has been a factor weighing in favor of a finding of preemption, rather than against it. *See Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 831, 840-41 (1982); *Bracker*, 448 U.S. at 146-48. The BIA's role here was to implement and execute road-building projects that improved or provided roads on Indian lands, using Indian labor as much as possible, in cooperation with the tribes involved. That role made the BIA a partner in the tribes' performance of the integral governmental functions of improving the transportation system and facilitating economic development. Under these circumstances, we hold that the fact that Blaze's contracts in this case were with the BIA, rather than the tribes, has no effect on the necessity for performing a pre-emption analysis, and that *United States v. New Mexico* is not applicable to this case.

The Pre-emption Analysis

In deciding whether state taxation of on-reservation activity has been pre-empted, we look primarily at congressional intent. *Cotton Petroleum,* 490 U.S. at 176. However, "the history of tribal sovereignty, serves as a necessary 'backdrop' to that process." *Id.* Pre-emption questions are not resolved by references to standards of pre-emption that have developed in other areas of the law, and are not controlled by rigid conceptions of state or tribal sovereignty. *Id.* Instead, what is required is a "flexible pre-emption analysis sensitive to the particular facts and legislation involved", *id.,* and 'a particularized examination of the relevant state, federal, and tribal interests.' *Id.* In performing such an analysis we must take into account "both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Id.* It is also important to note that ambiguities in federal law are ordinarily resolved in favor of tribal independence. *Id.* at 177.

With these principles in mind, we examine the parties' contentions and the facts of this case. Blaze contends that federal legislation and regulations concerning construction of roads on Indian lands are so pervasive that they pre-empt any state intrusion into the process. Blaze directs our attention to the fact that the contracts at issue were let under the Indian Financing Act of 1974, 25 U.S.C. Sections 1451 to 1543 (1988). Blaze also points out that construction of roads such as these is governed by a comprehensive scheme of federal regulations contained in 25 C.F.R. Sections 170.1-170.19 (1992). The BIA is responsible for planning, designing, and constructing roads, and for recomemnding projects to the tribes. Sections 170.3, 170.4a. Tribal decisions concerning road-building priorities are subject to the BIA's approval. Section 170.4a. In addition, the BIA is required to hold public hearings prior to commencement of construction of any new route, and decisions concerning such projects may be appealed by interested parties.

Sections 170.11, 170.19. The BIA is also required to conduct engineering and traffic analyses and determine appropriate speed and weight limits for roads maintained by the BIA. Section 170.8(b).

We agree that the Indian Financing Act and other federal statutes evince a federal interest in encouraging tribal self-sufficiency and promoting economic development. *See Cotton Petroleum*, 490 U.S. at 183 n.14. We also agree that federal regulatory involvement in road construction projects such as these is extensive. However, we understand the holding of *Cotton Petroleum* to be that general policies underlying federal legislation, and even extensive federal regulation concerning an activity, are not by themselves a sufficient basis for a finding of pre-emption. *See id.*; *id.* at 186. We are instead required to perform the particularized factual inquiry into the state, federal, and tribal interests mandated by *Cotton Petroleum*.

Blaze also argues that the Supreme Court, in *Bracker*, has already decided that federal involvement in the use of BIA roads is so all-encompassing that there is no room for application of a state tax. We note, however, that the Court in *Bracker* decided that federal and tribal interests concerning the tribe's logging activities, not the BIA roads themselves, were so strong as to pre-empt state taxation of the activities. *Bracker*, 448 U.S. at 148-49. *Bracker* is not, therefore, dispositive of the question presented by this appeal.

We turn now to the analysis of the relevant state, federal, and tribal interests in the construction activity performed by Blaze. In doing so, we are confronted immediately by the fact that the State has identified absolutely no interest in the activity, either through regulating it or by involvement in the process. The State had no part in planning the construction, played no role in selecting or licensing the contractor, did not regulate any aspect of the construction, and will not maintain the roads or regulate their use. This is, then, a case in which the State "has had nothing to do with the on-

reservation activity, save tax it." *Cotton Petroleum,* 490 U.S. at 186. The federal and tribal control over the projects has left the State with "no duties or responsibilities" concerning the construction. *Id.* at 185. Accordingly, it is extremely difficult for the State to justify the tax imposed on the activity. The lack of any state interest in on-reservation activity has been a crucial factor in decisions disallowing state taxation. *See Ramah,* 458 U.S. at 843; *Bracker,* 448 U.S. at 150; *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1412 (9th Cir. 1992); *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 661 (9th Cir. 1989), *cert. denied,* 494 U.S. 1055 (1990). Where a state has demonstrated a regulatory or other interest in the activity, however, courts have been willing to allow the tax to stand. *See, e.g., Cotton Petroleum,* 490 U.S. at 185-86; *Cabazon Band of Mission Indians v. California,* 788 F. Supp. 1513, 1519-20 (E.D. Cal. 1992).

Given that the applicable analytical framework requires an inquiry into the federal, state, and tribal interests, and given the principle of tribal sovereignty that forms a backdrop for the inquiry, these results make sense. Imposing a burden, in the form of taxation, on activity occurring solely on a tribe's reservation undeniably intrudes to some extent on the tribe's sovereignty. In order to justify such an intrusion, a state should be required to show some interest in the activity sought to be taxed, or the "state's interest" prong of the pre-emption test becomes meaningless. *Cf. Cotton Petroleum,* 490 U.S. at 184 (quoting, with approval, Justice Powell's concurring opinion in *Bracker,* 448 U.S. at 174: " 'The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control' ").

The State argues that it does not matter that it demonstrated no interest in the construction activity at issue in this case. According to the State, there was insufficient evidence that the taxes imposed on Blaze affected tribal

or federal interests at all. The State rests its argument on the asserted lack of any evidence showing that these particular projects would not have been built if Blaze had included state taxes in its bids. This argument misses the mark. It cannot be contested that, if contractors such as Blaze are required to pay state taxes on their road-building activities, the cost per mile of building roads on reservations will increase. Where the cost per mile is higher, fewer roads or smaller portions of roads can be built or improved for the same amount of money. *See Ramah,* 458 U.S. at 842 (state taxation of contractor depletes funds available for constructing Indian schools). In addition, there is less money available with which to pay wages to tribal members working on the road projects. State taxation, therefore, indirectly places a burden on the federal and tribal interests in improving the transportation system on reservations and in fostering the economic well-being of tribal members.

We rely on these common sense facts in determining that state taxation of projects such as these does interfere with the federal and tribal interests that are inherent in the construction of roads on reservations. *See Cotton Petroleum,* 490 U.S. at 186-87 (stating that it is reasonable to infer, even with a lack of evidence supporting such inference, that state severeance taxes have at least a marginal effect on the demand for on-reservation leases and the value of those leases to the tribe). The amount of money made available by Congress for building such roads is not unlimited; to the extent that state taxes on contractors diminish the amount of money that can be spent on actual construction, the taxes constitute a burden on the federal and tribal interests at stake.

We acknowledge that the burden imposed on such interests by state taxation on the contractors is an indirect one, unlike a situation in which the tribe's own economic activity is being taxed. We also acknowledge that similar indirect burdens were not sufficient to pre-empt the tax

in *Cotton Petroleum*. In the *Cotton Petroleum* case, however, as we have pointed out, the state was able to demonstrate a regulatory interest in the activity being taxed, and that it provided services to the tribe and lessees. *Id.* at 185-86. In this case, the State identified no interest at all in the construction activity. That is a decisive difference between the facts of this case and those in *Cotton Petroleum*. This case concerns roads built entirely on Indian reservations, built entirely with federal funds and under federal supervision, with the cooperation and assistance of the tribes, with labor provided largely by the respective tribes, by a company operating almost exclusively on reservations, and with no involvement by the State whatsoever. Even though the impact on the tribes and federal government in cases such as this is in the form of increased costs rather than direct taxation, given the lack of any State interest in the road construction, that indirect impact is sufficient to disallow the imposition of taxes on projects such as these. *Cf. Hoopa Valley Indian Tribe*, 881 F.2d at 660 n.2 (burden of tax assessed on non-Indian purchasers of tribal lumber held to fall on tribe).

CONCLUSION

Pursuant to the foregoing, we hold that the state taxes in question are pre-empted for the on-reservation activity involved in this case. Construction of roads is an integral governmental function that affects a tribe's economic development as well as the day-to-day lives of its members. Since the State could identify no interest in the construction activity, and the taxes burden federal and tribal interests by increasing the cost of road construction projects on reservations, the applicable pre-emption analysis precludes the State from taxing the activity. We therefore reverse the administrative decision allowing the State to impose the tax on Blaze.

IT IS SO ORDERED.

/s/ Benjamin Anthony Chavez
BENJAMIN ANTHONY CHAVEZ
Judge

WE CONCUR:

/s/ Rudy S. Apodack
RUDY S. APODACK
Judge

/s/ Harris L. Hartz
HARRIS L. HARTZ
Judge

APPENDIX D

BEFORE THE SECRETARY OF THE
TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE TAX LIABILITY OF BLAZE CONSTRUCTION COMPANY, I.D. No. 02-055925-00 9, Protest to Assessment No. 1002028.

DECISION AND ORDER

This matter came on for hearing on October 13, 1989 before Gerald B. Richardson, Hearing Officer. Blaze Construction Company, Inc., hereinafter "Taxpayer" or "Blaze," was represented by Gary Verburg, Esq. The New Mexico Taxation and Revenue Department, hereinafter "Department," was represented by Frank D. Katz, Esq. At the close of the hearing, it was agreed that the parties should brief the issues raised in this matter. Blaze's reply brief was received on December 26, 1989 and the matter was considered submitted for decision on that date. Based upon the evidence and arguments submitted in this matter, IT IS DECIDED AND ORDERED that:

1. On February 18, 1988, the Department issued Assessment No. 1002028 to Blaze Construction Company, Inc. in the amount of $222,409.55 in gross receipts and compensating tax, $22,240.95 in penalty and $46,358.03 in interest, for a total assessment of $291,008.53 for the reporting period of April 1, 1986 through October 1, 1987. The assessment was mailed to the Taxpayer on February 29, 1988 and was timely protested, pursuant to Section 7-1-24 NMSA 1978 on March 28, 1988.

2. The tax assessment at issue was generated based upon road construction activity performed by Blaze under

contracts with the Bureau of Indian Affairs for road construction work. The work was performed on the Jicarilla, Zia, Laguna and Navajo Indian Reservations. Blaze paid no New Mexico taxes upon its construction activities performed under these contracts. The contracts were as follows:

a. The Jicarilla Contract. Blaze was to grade, lay base course and pave a 1.7268 mile long stretch of road on the Jicarilla Reservation. The contract was awarded on May 13, 1986 and the contract amount inclusive of all change orders was $789,437.50.

b. The Laguna Contract. Under this contract, Blaze was to construct .8 of a mile of road, laying curb and gutter, base course and pavement on the Laguna Pueblo. The contract was awarded on May 21, 1986 in the amount of $327.274.

c. The Pinedale Contract. Under this contract, Blaze was to construct 4.3 miles of road at Pinedale on the Navajo Reservation, consisting of base course and paving. The contract was awarded on March 8, 1986 and the contract amount, inclusive of all change orders was $1,264,771.50.

d. The Zia Contract. Blaze was awarded a contract to grade, lay base course and fence a 4.4 mile stretch of road on the Zia Reservation. The contract was awarded on February 10, 1986 and the amount of the contract, including all change orders was $1,241,376.56.

3. Blaze is an Oregon corporation whose sole shareholder is Bill Aubrey. Mr. Aubrey is a Blackfeet Indian, and Blaze qualifies as a 100% Indian-owned entity under the Indian Financing Act of 1974, 25 U.S.C. Section 1451, *et seq*. Blaze's headquarters and Mr. Aubrey's residence are in Yakima, Washington. During the period of time Blaze was performing these contracts in New Mexico, it maintained an office at each contract location. Subsequent to the assessment period at issue, Blaze opened

an office in Albuquerque, located at 1000 Gabaldon Street. Blaze maintains a general manager in New Mexico, Mr. Wood, and also maintains approximately ten full-time employees in New Mexico. These employees are at the supervisor level. Under the terms of the contracts at issue with the Bureau of Indian Affairs, Blaze was required to hire local people (Indians) from each tribe or pueblo upon which the construction project occurred. Besides providing the employment pool for the labor to perform the contracts, the tribes or pueblos provided right-of-way for the roads being constructed, if they were new roads which required new right-of-way, and water and base materials needed for the road construction project. The tribes were also involved in the process of planning the road course through tribal land. In performing these contracts, Blaze was not licensed as a construction contractor by the state of New Mexico. In performing these contracts, Blaze did acquire some materials, such as liquid asphalt, from off the reservation and, additionally, it rented machinery from New Mexico businesses located off reservation. In making these purchases, however, Blaze testified that it did not use nontaxable transaction certificates authorized by Sections 7-9-51 and 7-9-52 NMSA 1978. Rather, Blaze testified that it paid the tax which was included on the invoices from its suppliers for the work on these contracts.

4. In calculating the bids submitted to the Bureau of Indian Affairs for these contracts for which Blaze was the successful bidder, Mr. Wood, who as general manager prepared the bid, testified that upon the instructions of Mr. Aubrey, he did not figure New Mexico gross receipts tax into the amounts submitted as bids. Although the Department informed Blaze, by letter dated May 9, 1986, that it considered these construction contracts to be subject to New Mexico gross receipts tax (Department's Exhibit 1), the evidence indicated that all of the contracts at issue were bid by Blaze prior to receiving the Department's advice.

5. The roads in question were built pursuant to 23 U.S.C. Section 204, the Federal Lands Highway Program. This statute authorizes road construction on several different types of federal lands, specifically; forest highways, public lands highways, park roads, parkways and Indian reservation roads, as defined in 23 U.S.C. Section 101. Because these roads were also located on an Indian reservation, the regulations found at 25 C.F.R. Sections 170.1 through 170.19 also applied.

6. The first issue raised by Blaze concerns the tax rate applicable to Blaze's receipts from performing the construction services on the contracts at issue. Laws 1986, Chapter 20, Section 63 raised the gross receipts tax rate from 3¾ to 4¾ percent effective July 1, 1986. Concurrently, the legislature enacted Section 7-9-4.1 NMSA 1978 which is a temporary provision which allows a credit in the amount of the increased taxes for a taxpayer who becomes liable for additional tax because of the rate increase. The credit applies on the taxpayer's receipts from a fixed fee or unit price construction contract with a federal agency or instrumentality which was entered into prior to July 1, 1986. However, in order to claim the credit, the contractor needed to give the Department notice of intent to claim the credit within 120 days from July 1, 1986, pursuant to G.R. Regulation 4.1:2. The Taxpayer presented no evidence that it had done so in this case, and therefore, the Taxpayer is not eligible for a reduction in the gross receipts tax rate applied under the Department's assessment.

7. The second issue concerns whether Blaze can be considered an "Indian" for purposes of application of the doctrine expressed in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 64 (1973), that states lack the authority to tax the activities of Indians occurring on Indian reservations. As noted earlier, the Taxpayer is a corporation which is wholly-owned by Bill Aubrey, a Blackfeet Indian. In *Eastern Navajo Industries v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (Ct. App.

1978), the New Mexico courts addressed whether an Indian-owned corporation is afforded the same immunity from state taxation as an Indian would be for its activities occurring on an Indian reservation. The Court of Appeals granted the same tax immunity to the corporation which would have been granted to an Indian individual. In *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (Ct. App. 1975), *cert denied*, 88 N.M. 318, 540 P.2d 248 (1975), U.S. *cert. denied*, 424 U.S. 933 (1976), the New Mexico Court of Appeals ruled that New Mexico could not impose an income tax upon a Comanche Indian's income earned upon the Navajo Reservation. Thus, under New Mexico precedent, neither a taxpayer's status as a corporation, or its status as a member of an Indian tribe other than the tribe upon whose reservation the activity taxed occurs negates the immunity from state taxation conferred under the principles of the *McClanahan* case. Subsequent to the *Eastern Navajo Industries* and *Fox* decisions, however, the United States Supreme Court addressed the issue of membership status as affecting tax immunity in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). In that case, the Supreme Court ruled that nonmember Indians resident on the reservation but not enrolled in the governing tribe were taxable to the same extent as non-Indians. Thus, enrolled status in the tribe upon whose reservation the taxed activity occurs is required before the tax immunity principles of the *McClanahan* case become applicable. In this instance, since Blaze is owned by a Blackfeet Indian and the activities being taxed were performed upon Indian reservations other than the Blackfeet Reservation, Blaze is not an Indian for purposes of the application of the Indian tax immunity doctrine expressed in *McClanahan*.

8. Blaze next contends that New Mexico's attempt to tax its road construction activities on Indian reservations in New Mexico is preempted by federal law. Specifically, Blaze relies upon *White Mountain Apache Tribe v.*

Bracker, 498 U.S. 136 (1980) and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) in support of its position that the taxes at issue are preempted. In *White Mountain*, the Court ruled that Arizona's attempt to tax a non-Indian company which had contracted with a tribal logging enterprise to sell, load and transport timber on an Indian reservation was preempted because the tax interfered with the federal government's comprehensive regulation of the harvesting and sale of tribal timber. In *Ramah*, the Supreme Court struck down New Mexico's attempt to impose its gross receipts tax on a non-Indian contractor building a school upon the Navajo Reservation on the basis that the tax interfered with the comprehensive federal scheme to provide for Indian education.

9. The Department contends that the special Indian preemption doctrine as embodied in the *White Mountain* and *Ramah* decisions is inapplicable to the instant case because in this case, the Department is only attempting to tax the Taxpayer's receipts from performing a contract with the federal government, in this instance, the Bureau of Indian Affairs. The Department relies upon *United States v. New Mexico*, 455 U.S. 720 (1982). That case stands for the proposition that the federal government's immunity from state taxation does not shield it from the economic burden of nondiscriminatory state taxes applied to its contractors unless the intention to preempt the taxes has been made explicit in federal legislation. A review of the cases applying the Indian preemption doctrine reveals that in all cases, the taxpayer was contracting with or receiving income directly from an Indian tribe or a tribal entity. Thus, none of the cases presented the exact question presented here. In this instance, the road construction at issue was performed pursuant to Federal Lands Highway Program, 23 U.S.C. Section 204. 23 U.S.C., Section 204(a) states:

> Recognizing the need for all federal roads which are public roads to be treated under the same uniform

> policies as roads which are on the federal-aid systems, there is established a coordinated federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways and Indian reservation roads as defined in Section 101 of this title.

A reading of the above makes it clear that this is a general federal program to provide for the construction and improvement of roads upon all federal lands, be they forests, parks or Indian reservations. Under current intergovernmental tax immunity doctrine, as expressed in *U.S. v. New Mexico* and *South Carolina v. Baker,* 485 U.S. —— 108 S.Ct. 1355 (1988), New Mexico could tax private parties with whom the United States contracts even though the financial burden of the tax falls upon the United States. There is no logical reason to treat the Taxpayer's receipts in this instance any differently solely because the work was performed on an Indian reservation. The fact remains that this was a contract with the United States, and the financial burden of these taxes will fall only upon the United States. In this regard, it is noteworthy that, although under 25 C.F.R. Section 170.6(a) the Commissioner of Indian Affairs may seek contribution from tribal funds for the road construction, there was no evidence presented in this case that any tribal funds comprised any part of the contract monies received by the Taxpayer. It is also significant that the roads constructed under this program are federal and not tribal roads. The construction of these roads is under the general supervision of the Secretary of Transportation, 25 C.F.R. Section 170.4. The roads are maintained by the Commissioner of Indian Affairs, 25 C.F.R. Section 170.6. Finally, the roads are required to be open to free public use, 25 C.F.R. Section 170.8. Thus, in order to be eligible for federal funds for construction of these roads, the tribes must waive an aspect of their sovereignty, the right to exclude non-members from their territory. Since only federal monies are impacted, the activity being taxed is actively being performed for the federal government,

and the roads are federal and not tribal roads, the intergovernmental tax immunity doctrine expressed in *U.S. v. New Mexico* is the doctrine which is applicable to this case. Under that test, the Taxpayer is subject to New Mexico's nondiscriminatory tax upon its receipts from performing services for the federal government.

10. Even should the special federal preemption test applied in *Ramah* and *White Mountain* apply in this case, New Mexico is not pretempted from applying its taxes upon Blaze's receipts. The special Indian preemption test was set out in the *White Mountain* case as follows:

> In such cases, we've examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain, 448 U.S. at 145-146. The most recent Supreme Court case applying the special Indian preemption doctrine was *Cotton Petroleum Corporation v. New Mexico*, 109 S. Ct. 1698 (1989). In that case, the Supreme Court addressed whether New Mexico's oil and gas severance taxes could be imposed upon non-Indian oil and gas producers whose operations were located on an Indian reservation. The Court concluded that neither the federal laws promoting tribal economic self-sufficiency, nor the federal laws governing Indian mineral leasing preempted the state tax at issue. Although the Court in *Cotton* did not depart from its formulation of the federal preemption doctrine as expressed in *Ramah* and *White Mountain*, the Court's preemption analysis was more rigorous and more closely focused on determining congressional intent to preempt or not preempt state taxes

than the earlier cases. For example, the Court found no congressional intent to preempt state tax in the Indian Reorganization Act, 25 U.S.C. Section 461, *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. Section 450, *et seq.*, or the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Section 450, *et seq.*, even though those statutes "evidence to varying degrees a congressional concern with fostering tribal self-government and economic development." 109 S. Ct. at 1711, n. 14. Thus, even though in this case each road construction project was bid out pursuant to the Indian Financing Act of 1974, that act provides no basis for a finding of federal preemption from state taxes.

11. An examination of the statutes under which these road construction contracts were issued, the Federal Lands Highway Program, 23 U.S.C. Section 204, reveals no federal intention to preempt nondiscriminatory state taxes. As previously stated, 23 U.S.C. Section 204(a), quoted at paragraph 9, *supra*, makes it clear that under the act, the federal government recognized the need for federal roads on federal lands to be treated under the same uniform policies as roads which are part of the federal aid system. To satisfy this need, Congress established a coordinated federal lands highways program consisting of forest highways, public lands highways, park roads, parkways and Indian reservation roads. Subsection (a) of 23 U.S.C. Section 204 was enacted by Public Law 97-424, January 6, 1983. The former provision which specifically referred to Indian reservation roads, 23 U.S.C. Section 208, was repealed by the same act, lending further credence to the fact that Indian reservation roads were to be treated under the same uniform policies as other federal roads on federal lands. The legislative history of Public Law 97-424 further supports the conclusion that all federal lands highways, be they on an Indian reservation or not, are to be treated alike under the Federal Lands Highway Program. The conference committee report to the 1983 amendments emphasized that in both the house and senate bills, the

"Secretary of Transportation is made responsible for oversight and coordinating the federal lands highways in order to ensure that such highways are treated under the same uniform policies." 1982 U.S. Code Congressional and Administrative News, 3709-3710.

Only a few differences exist in the administration of Indian reservation roads from other federal land roads, as demonstrated by 23 U.S.C. Section 204. While forest highways and public lands highways are administered by the secretary of transportation, park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. For Indian reservation roads, Indian labor may be employed and no ceiling on federal employment applies. Additionally, the Buy Indian Act and provisions of Section 7(B) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. As was noted earlier, however, the Court in *Cotton* found no congressional intention to preempt state taxation in the Indian Self-Determination and Education Assistance Act of 1975. In any event, nothing in these provisions concerning the administration of Indian roads evidences any congressional intention to treat Indian roads differently than other federal lands roads for state tax purposes.

12. The regulations found at 25 C.F.R. Section 170, *et seq.*, which apply to these Indian reservation road construction projects also do not evidence a comprehensive federal scheme which would support a finding of congressional intention to preempt state authority to tax. Rather than evidencing a comprehensive federal scheme concerning Indian roads which excludes states entirely, 24 C.F.R. Section 170.7 allows the commissioner to enter into cooperative agreements with the states for the construction and maintenance of Indian reservation roads, especially where those road projects serve non-Indian land as well as Indian land. Although the regulations allow

tribal authorities to establish annual priorities for road construction projects (25 C.F.R. Section 170.4a), provide for obtaining tribal grants of right of way (25 C.F.R. Section 170.5), provide for Indian employment and contracts with Indian-owned construction companies (25 C.F.R. Section 170.5a) and allow the Commissioner to solicit tribal funding (25 C.F.R. Section 170.6a), these provisions go no farther than the statutes under which they're promulgated, the Federal Lands Highway Program, in evidencing a congressional intent to preempt these state taxes.

13. There was considerable discussion at the hearing concerning Blaze's attempt to prove that the imposition of the taxes at issue would burden the tribes in that fewer miles of roads could be constructed if the taxes were imposed. The record on this was speculative, at best. Neither Mr. Aubrey nor Mr. Woods could testify concerning whether or not the Bureau of Indian Affairs allowed for the imposition of state taxes in arriving at their engineer's estimate as to the allowable cost of the projects. Apparently, the Bureau of Indian Affairs provided no guidance to potential bidders concerning the applicability of state taxes. This is not remarkable considering the fact that for other road construction projects administered by the Secretary of Interior on park roads and parkways, the state would be entitled to impose its taxes on the contractors under *U.S. v. New Mexico.* The imposition of state taxes on private contractors constructing roads under the Federal Lands Highway Program on all roads which are not reservation roads does impose some degree of financial burden on the federal government's construction program, but this financial burden is permissible under the status of the law concerning intergovernmental tax immunity, and there is simply nothing in the Federal Lands Highway Program to indicate that different results should attach if the particular roads being constructed are Indian roads. It should be emphasized

that this is not a case such as *Ramah* or *White Mountain* where the state tax results in a direct financial burden being imposed upon a tribal entity. In this case, the tribes made no financial contribution to these road projects. This tax falls only upon the federal government. Additionally, as discussed in paragraph 9, *supra,* the Federal Lands Highway Program, 23 U.S.C. Section 204 and the regulations governing Indian reservation roads under that program, 25 C.F.R. Section 170 *et seq.,* make it clear that the roads in issue are federal and not tribal roads. Thus, there has been no showing of impairment of a tribal interest and the federal interest is impaired no more than under any other road construction contract administered under the Federal Lands Highway Program. Although the Department failed to present evidence concerning the state's interest in taxing Blaze's activities, in the absence of an impermissible impairment of the tribal and federal interests, and in the absence of anything evidencing a congressional intent to preempt the state tax, the tax is not preempted. As stated by the Court in *Cotton,* "to find preemption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factors such as those present in *Bracker* and *Ramah Navajo School Board* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. . . . Absent more explicit guidance from Congress, we decline to return to this long discarded and thoroughly repudiated doctrine." 109 S. Ct. at 1713.

13. For the foregoing reasons, the Taxpayer's protest is denied.

Done this 23rd day of January, 1990, in Santa Fe, New Mexico.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON
Hearing Officer
Taxation and Revenue Department

/s/ Gail Reese
GAIL REESE
Secretary
Taxation and Revenue Department

APPENDIX E

STATUTES INVOLVED

1. The New Mexico Gross Receipts and Compensating Tax Act, Ch. 7, Article 9 NMSA 1978 (Supp.), provides in pertinent part:

7-9-2. Purpose.

The purpose of the Gross Receipts and Compensating Tax Act [this article] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax."

A. For the privilege of engaging in business, an excise tax equal to five percent [x] of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

7-9-7. Imposition and rate of tax; denomination as "compensating tax."

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent [y] of the value of tangible property that was:

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[x] The rate of five percent was substituted for a prior rate of four and three-fourths percent by N.M. 1st S.S. Ch. 1, § 2.

[y] See n. ——, supra.

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

For the purpose of this subsection, value of tangible property shall be determined as of the time of acquisition or introduction into this state or of conversion to use, whichever is later.

B. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to five percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

C. The tax imposed by this section shall be referred to as the "compensating tax."

7-9-9. Liability of user for payment of compensating tax.

Any person in New Mexico using property on the value of which compensating tax is payable but has not

been paid is liable to the state for payment of the compensating tax, but this liability is discharged if the buyer has paid the compensating tax to the seller for payment over to the department.

2. *The Indian Self-Determination and Education Assistance Act, P.L. 93-638, approved January 4, 1975, 88 Stat. 2203, as amended, provides:*

25 U.S.C. § 450a Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. § 450f Contracts by Secretary of the Interior with tribal organizations

(a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596) [25 USCS §§ 452 et seq.], as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674) [42 USCS §§ 2001 et seq.], as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days

ater receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(b) whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the organization to overcome the stated objections, and

(3) provide the organization with a hearing on the record and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

(c)(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative

agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451 et seq.), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

25 U.S.C. § 450n Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

(Jan. 4, 1975, P. L. 93-638, Title I, § 110, 88 Stat. 2213.)

3. Section 124(b) of the Surface Transportation Act of 1982, P.L. 97-424. approved January 6, 1983, 96 Stat. 2097, 2114, 23 U.S.C. § 204 provides:

§ 204. Federal Lands Highways Program [lands highways program]

(a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title [23 USCS § 101].

(b) Funds available for forest highways and public lands highways shall be used by the Secretary to pay for the cost of construction and improvement thereof. Funds available for park roads, parkways, and Indian reservation roads shall be used by the Secretary of the Interior to pay for the cost of construction and improvement thereof. In connection therewith, the Secretary and the Secretary of the Interior, as appropriate, may enter into construction contracts and such other contracts with a State or civil sub-

division thereof or Indian tribe as deemed advisable. In the case of Indian reservation roads, Indian labor may be employed in such construction and improvement under such rules and regulations as may be prescribed by the Secretary of the Interior. No ceiling on Federal employment shall be applicable to construction or improvement of Indian reservation roads.

(c) Before approving as a project on an Indian reservation road any project on a Federal-aid system in a State, the Secretary must determine that the obligation of funds for such project is supplementary to and not in lieu of the obligation, for projects on Indian reservation roads, of a fair and equitable share of funds apportioned to such State under section 104 of this title [23 USCS § 104].

(d) Cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement, and any funds received from a State, county, or local subdivision shall be credited to appropriations available for the class of Federal lands highways to which such funds were contributed.

(e) Construction of each project shall be performed by contract awarded by competitive bidding, unless the Secretary or the Secretary of the Interior shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Notwithstanding the foregoing, the provisions of section 23 of the "Buy Indian" Act of June 25, 1910 (36 Stat. 891) [25 USCS § 47], and the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2205) [25 USCS §450e(b)] shall apply to all funds administered by the Secretary of the Interior which are appropriated for the construction and improvement of Indian reservation roads.

(f) All appropriations for the construction and improvement of each class of Federal lands highways shall be administered in conformity with regulations and agreements jointly approved by the Secretary and the Secretary of the appropriate Federal land managing agency.

APPENDIX F

REGULATIONS INVOLVED

1. *Part 170—Roads of the Bureau of Indian Affairs—of Title 25 of the Code of Federal Regulations provides in pertinent part:*

§ 170.3 Construction and improvement.

Subject to the availability of appropriations for Indian reservation roads and bridges and any other contribution of State or Indian tribal lands, the Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System to provide an adequate system of road facilities serving Indian lands.

§ 170.4 Approval of road construction activities.

The Secretary of Transportation or his authorized representative shall approve the location, type, and design of all projects on the Federal-Aid Indian Road System before any construction expenditures are made. All such construction shall be under the general supervision of the Secretary of Transportation or his authorized representative.

(23 U.S.C. 208)

§ 170.4a Selection of road construction projects.

The Commissioner, who is responsible for the planning, surveys and design, shall keep the appropriate local tribal officials informed of all technical information relating to the project alternatives of proposed road developments. The Commissioner shall recommend to the tribe those proposed road projects having the greatest need as determined by the comprehensive transportation analysis. Tribes shall then establish annual priorities for road construction projects. Subject to the approval of the

Commissioner, the annual selection of road projects for construction shall be performed by tribes. Funds available for the construction of roads on the Federal-Aid Indian Road System shall not be used for the capital improvement to privately-owned property. (39 Stat. 355)

§ 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

(b) If it appears that the road might be transfered to the tribe, the county or the State within 10 years, then before such construction is undertaken, right-of-way easements for the project shall be obtained in favor of the United States, its successors and assigns, with the right to construct, maintain, and repair improvements thereon and thereover, for such purposes and with the further right in the United States, its successors and assigns, to transfer the right-of-way easements by assignment, grant or otherwise.

§ 170.5a Employment of Indians.

The Bureau of Indian Affairs road program shall be administered in such a way as to provide training and employment of Indians. The Commissioner may contract with tribes and Indian-owned construction

companies, or the Commissioner may purchase materials, obtain equipment and employ Indian labor in the construction and maintenance of roads.

(36 Stat. 861; 78 Stat. 241, 253; 78 Stat. 257; 25 U.S.C. 47; 42 U.S.C. 2000e(b), 2000e-2(i); 23 U.S.C. 208(c))

§ 170.6 Maintenance of Indian roads.

The administration and maintenance of Indian reservation roads and bridges is basically a function of the local Government. Subject to the availability of funds, the Commissioner shall maintain, or cause to be maintained, those approved roads on the Federal-Aid Indian Road System. The Commissioner may also maintain roads not on the Federal-Aid Indian Road System if such roads meet the definition of "Indian reservation road and bridges" and are approved for maintenance by the Commissioner. No funds authorized under 23 U.S.C. 208 are available for the maintenance of roads.

§ 170.6a Contributions from tribes.

The Commissioner may enter into agreements with an Indian tribe for a contribution from its tribal funds for the construction or maintenance of roads governed by regulations of this part. However, the tribe must be able to make such contributions without undue impairment of the necessary tribal functions.

2. *Part 271—Contracts Under the Indian Self Determination Act of the Code of Federal Regulations provides in pertinent part:*

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expres-

sion of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians and to facilitate the coordination of all Federal and other programs on Indian reservations.

(d) It is the policy of the Bureau to continually encourage Indian tribes to become increasingly knowledgeable about Bureau programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Bureau to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts.

(e) It is the policy of the Bureau not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be made known to all tribes, as should the current realities of funding and Federal personnel limitations.

(f) Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. Another mechanism afforded Indian tribes is the use of a grant, as provided in part 272 of this chapter, or other resources, to plan the manner in which it wishes the Bureau to operate a program or portion thereof.

(g) Contracting by its very nature places Bureau officials in the dual position of assisting Indian tribes, in many instances, by furnishing technical assistance in preparation of contract proposals, and of carrying out their fiscal and administrative responsibilities as officials of the Federal Government. It is recognized that very often these two positions are in opposition to each other. The Act and these regulations are designed to address this problem to the degree practicable. The Commissioner, Area Directors and Superintendents, as line officers of the Bureau, are expected to balance these two positions within the framework of the regulations in this part.

(h) The regulations in this part are not meant to and do not change the eligibility criteria which individuals must meet to be eligible for any program currently operated by the Bureau. The eligibility criteria for each Bureau program is given in the part of 25 CFR chapter I, which deals with that program. A contractor shall use the existing Bureau eligibilty criteria in operating all or parts of a Bureau program under a contract under this part unless a waiver is obtained from the Commissioner. The Commissioner may not waive eligibilty criteria established by statute. The Commissioner may waive eligibilty criteria established by regulation in 25 CFR chapter I.

Subpart B—Application Process

§ 271.11 Eligible applicants.

Any tribal organization is eligible to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of Bureau programs under section 102 of the Act. However, before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the Indian tribe or tribes to be served by the contract in accordance with § 271.18.

§ 271.12 Contractable Bureau programs.

(a) Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians. All or parts of any program include:

(1) Any part of a Bureau program which is divisible from the remainder of the program so long as the contract does not significantly reduce benefits to Indians served by the non-contracted part(s) of the program. However, to the extent that it is within the Bureau's existing authority and the program or part thereof involves only one tribe and one Bureau Agency or Area Office, the benefits provided to Indians by the non-contracted part(s) of the program may be reduced at the request of the tribe. When the program or part thereof serves more than one tribe, the benefits provided by the noncontracted part(s) of the program may be reduced when all of the tribes served consent to a reduction.

Supreme Court, U.S.
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No. 94-1233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BLAZE CONSTRUCTION CO., INC.,
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the authority of a State to impose a non-discriminatory tax on contractors performing work for the federal government on Indian reservations determined under the intergovernmental immunity doctrine as enunciated in *United States v. New Mexico*, 455 U.S. 720 (1982), or under the Indian pre-emption doctrine, previously applied only to taxpayers contracting with tribes, tribal members or tribal entities for work done on tribal reservations.

2. If the Indian pre-emption doctrine were applicable, does the Federal Lands Highway Program evince a congressional intent to pre-empt state tax on the construction of public federal roads built for the Bureau of Indian Affairs (BIA) on tribal reservations, as required by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. AUTHORITY OF STATES TO TAX FEDERAL CONTRACTORS BUILDING PUBLIC FEDERAL ROADS ON INDIAN RESERVATIONS IS DETERMINED UNDER INTERGOVERNMENTAL TAX IMMUNITY PRINCIPLES, NOT THE SPECIAL INDIAN PRE-EMPTION DOCTRINE 3

II. NO CONGRESSIONAL INTENT TO PRE-EMPT STATE TAX CAN BE FOUND WITHIN THE FEDERAL LANDS HIGHWAY PROGRAM 7

A. State Responsibilities Toward Indian Citizens Provides A Strong State Interest in Imposing Tax on Transactions Between Non-Members 7

B. Any Impact on Tribal Interests is Indirect and Insubstantial, and Does Not Result From Taxes Imposed On or Passed On to Tribes 9

C. Congress Clearly Intended These Indian Reservation Roads to be Treated the Same as Other Federal Lands Highways 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases:

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) 3

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 6-11, 14

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 3

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 5

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 5

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 3, 6

Ramah Navajo Sch. Bd., Inc., v. Bureau of Revenue, 458 U.S. 832 (1982) 3, 6, 8, 10, 11

United States v. California, 113 S.Ct. 1784 (1993) 3

United States v. New Mexico, 455 U.S. 720 (1982) . . 3, 13

United States v. Wheeler, 435 U.S. 313 (1978) 5

Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) 3, 8

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 6

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 6, 7, 10, 11

Miscellaneous:

23 U.S.C. § 204 . . . . . 1, 12, 13

23 U.S.C. § 204(j) 2

23 U.S.C. § 208 . . . . . 12, 14

25 C.F.R. § 170 13

25 C.F.R. § 170.6a 13

25 CFR 170.7 . . . . . 2, 13

1982 U.S. Code Congressional and Administrative News 13

Felix Cohen, *Handbook of Federal Indian Law* (1982) 4, 5

Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.* 4, 6

Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* 4, 6

Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* 4, 6, 12

Pub. L. 97-424 . . . . . 12, 13

IN THE

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OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF IN OPPOSITION

The Taxation and Revenue Department of the State of New Mexico (Department) respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Blaze Construction Co., Inc. (Blaze).

STATEMENT OF THE CASE

Blaze's Statement of relevant law, the facts and the proceedings below is accurate, but incomplete. Several significant facts have been omitted.

The four roads in question were built under the Federal Lands Highway Program, 23 U.S.C. § 204, as part of a

coordinated program for highway construction on a variety of federal lands. These federal roads are required by law to be open to the public, unlike tribal roads on which tribes can bar non-members' use. (Pet. 33a) The Federal Lands Highway Program specifically involves the states in various respects, even on roads built on Indian reservations. (Pet. 36a; 23 U.S.C. § 204(j); 25 CFR 170.7)

The BIA issued Solicitations for Bids on the four projects indicating a range of prices it expected to pay for each project. The top range for each project was sufficiently high to have permitted the addition of tax without any diminution in the road-building activity. (Record Proper (RP) 55, 63, 67, 71) Blaze's general manager testified that the BIA's engineer's estimate would include taxes if taxes were due. (Transcript of Proceedings (Tr) Side II, 018) The only testimony concerning whether the addition of tax would diminish the amount of roadbuilding activity was found by the finder of fact to be speculative, at best. (Pet. 37a)

Although bids had been submitted on all the contracts before April 10, 1986, when Blaze formally inquired whether its receipts would be subject to state tax, the Department promptly gave Blaze a written opinion that tax would be due. (RP 85) Blaze subsequently made numerous requests of the BIA for change orders, but never sought payment for these taxes. (RP 55-76) Nor did it report or pay the tax.

REASONS FOR DENYING THE WRIT

I. AUTHORITY OF STATES TO TAX FEDERAL CONTRACTORS BUILDING PUBLIC FEDERAL ROADS ON INDIAN RESERVATIONS IS

DETERMINED UNDER INTERGOVERNMENTAL TAX IMMUNITY PRINCIPLES, NOT THE SPECIAL INDIAN PRE-EMPTION DOCTRINE.

New Mexico's authority for taxing a federal contractor's receipts from performing construction services for an agency of the federal government, here the BIA, rests on thoroughly settled law and does not merit reconsideration here. This Court has repeatedly affirmed the authority of states to tax federal contractors. *United States v. California*, 113 S.Ct. 1784 (1993); *United States v. New Mexico*, 455 U.S. 720 (1982). Blaze concedes this point. Its petition for certiorari, therefore, asks this Court to establish an unprecedented extension of the Indian pre-emption doctrine, based on an untenable premise equating the BIA with tribal governments.

Blaze acknowledges that the Indian pre-emption analysis derives from notions of tribal sovereignty.[1] It seeks to supply

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[1] The Indian pre-emption doctrine has never been applied where a taxpayer has contracted with the federal government. In every case using that analysis, the taxpayer was dealing directly with a tribe or tribal member. *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd., Inc., v. Bureau of Revenue*, 458 U.S. 832 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). The Court's early formulation of the doctrine in *McClanahan* explains why it is limited to those dealing with tribes. What distinguishes Indian pre-emption from normal pre-emption is "Indian sovereignty . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court in *Bracker* confirmed tribal sovereignty as the key. "The unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments

that tribal sovereignty element by equating federal government activity on Indian reservations with tribal government activity. Blaze argues that "the BIA is acting as a surrogate on behalf of the tribe" (Pet. p. 16) and "the BIA is effectively providing local government services on behalf of the tribe." (Pet. p. 12)

Given the immense struggle tribes have fought against the United States government and the paternalism of its agencies, it is inappropriate for this business to presume to speak for tribes in arguing that the BIA is really equivalent to a tribal government. Any suggestion that the federal government is interchangeable with, or even has always supported, tribal governments completely ignores the roller-coaster history of federal policy towards tribal sovereignty.[2] The federal government can hardly be equated with tribal governments.

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regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law." 448 U.S. at 143.

[2] After the initial period of displacement and annihilation and after the surviving Indians had been corralled on reservations, Congress did not support tribal sovereignty at all. Rather, it advocated turning Indians into yeoman farmers through allotments under the General Allotment Act of 1887 in order to eliminate entirely reservations and tribal sovereignty. Beginning in the late 1920s and culminating with the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, Congress did a complete about-face, adopting policies to encourage tribal sovereignty. It reverted to a policy of urban resettlement and termination of tribal reservations and sovereignty during the 1940s and 1950s, and then resumed its encouragement of tribal sovereignty and economic development with the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.* and the Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* *See* Felix Cohen, *Handbook of Federal Indian Law* (1982), Chapter 2 for a full discussion of this history.

The support and services the federal government provides Indians are not manifestations of tribal sovereignty, but more in the nature of reparation for their loss of land and way of life, *see* Cohen, *Federal Indian Law* 673.

Blaze confuses the exercise of *federal* governmental authority and obligation with the exercise of tribal sovereignty. The very nature of concentric sovereignties—state, federal and tribal—is that each sovereign performs some governmental functions on the same territory, within their overlapping jurisdictions. The fact that the federal government builds BIA roads on tribal lands, or interstate highways on state lands, does not endow the federal government with tribal or state sovereignty. Similarly, the fact that the state provides schools, roads, and senior citizen centers on reservations does not mean the state is exercising tribal sovereignty.

In lumping together the BIA and tribal governments, Blaze ignores the substantial body of law that distinguishes tribal governments from the federal government. *See United States v. Wheeler*, 435 U.S. 313 (1978) (federal government and tribal governments are independent sovereigns so that the double jeopardy clause does not bar separate prosecutions by each sovereign). The Supreme Court has repeatedly rejected a return to the federal instrumentalities doctrine equating tribes and the federal government. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 471 (1976). Tribes have been unwaveringly clear that the federal government most assuredly does *not* exercise *tribal* governmental authority or sovereignty. They have never been willing to make the federal government "a surrogate on behalf of the tribe" (Pet. p. 16) for the performance of tribal government functions.

Blaze argues that the Indian Self-Determination Act provides a comprehensive scheme to promote tribal self-governance, intertwining the BIA and tribes. Allowing states to tax BIA contractors, Blaze contends, would infringe tribal sovereignty because such taxation could influence whether a tribe chooses to assume responsibility for the performance of certain services otherwise performed by the federal government under its trust responsibilities.

This Court explicitly rejected any such interpretation of the Indian Self-Determination Act in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Acknowledging that the Indian Reorganization Act, the Indian Financing Act, and the Indian Self-Determination Act "'evidence to varying degrees a congressional concern with fostering tribal self-government and economic development,'" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980)), the Court found no congressional intent to pre-empt state taxation in these acts. "[T]hey no more express a congressional intent to pre-empt state taxation of oil and gas lessees than does the 1938 Act." *Cotton Petroleum*, 490 U.S. at 183, (n. 14).

The fact that Congress in the Self-Determination Act authorized tribes to take over certain federal responsibilities on reservations only underlines the distinction between the federal government and the newly empowered tribal governments asserting their sovereignty. When tribes do assert their sovereignty and take over certain governmental responsibilities, by developing their forest industries in *Bracker*, their schools in *Ramah* or their hunting and fishing resources in *New Mexico v. Mescalero Apache Tribe*, that assertion of tribal sovereignty *does* invoke the Indian pre-

emption analysis. If carrying out government functions is left to the federal government, however, then Congress can and will decide whether a state tax on its contractors so interferes with its projects that such tax must be pre-empted.

Here, there can be no doubt that it is the federal government, acting through one of its agencies, on its own behalf that is contracting with Blaze. The law is well settled that New Mexico can tax federal contractors. No basis exists to justify extension of the Indian pre-emption analysis to determine the constitutionality of state tax imposed on federal contractors. Because there is no conflict in the law, this Court should not grant *certiorari*.

II. NO CONGRESSIONAL INTENT TO PRE-EMPT STATE TAX CAN BE FOUND WITHIN THE FEDERAL LANDS HIGHWAY PROGRAM.

Even were the Indian pre-emption doctrine applicable, that doctrine, as most recently interpreted by this Court in *Cotton Petroleum*, does not yield pre-emption of state tax here. Moreover, since the Indian pre-emption doctrine requires a case by case analysis, the result in this particular case will not affect other situations and does not merit the granting of *certiorari*.

A. State Responsibilities Toward Indian Citizens Provides A Strong State Interest in Imposing Tax on Transactions Between Non-Members.

Blaze's only contention under the Indian pre-emption analysis is that the New Mexico Supreme Court misinterpreted *Cotton Petroleum* to eliminate "the requirement in *Bracker* and

Ramah that the State identify a regulatory function or service related to the activity being taxed." (Pet. p. 24) Blaze argues that the state's general interest in raising revenue for the common good is insufficient.

Blaze fails to acknowledge that the time has long since passed when states provided no services to tribes which would justify their interest in taxing. States now spend millions of dollars on tribal reservations, more than justifying whatever slight and indirect impact may be felt by tribes from taxes imposed on non-members, the economic burden of which is borne by non-members.

Although focusing primarily on congressional intent, the Court in *Cotton Petroleum* did comment on the nature of the state and tribal interests involved. In particular, the Court recognized that New Mexico's annual expenditure of over $3,000,000 for the Jicarilla Apache tribe represented a substantial state interest. Interestingly, much of that expense funded education of Jicarilla tribal members. Inevitably, that same state support described in *Cotton Petroleum* here assisted Blaze with an educated workforce and tribal members with the ability to qualify for employment. Although it may once have been true that "federal legislation left the state with no duties or responsibilities respecting the reservation Indians," *Warren Trading Post*, 380 U.S. at 691, that simply is not true today. Tribal members living on reservations are full state citizens and entitled to all the benefits of such citizenship. New Mexico shoulders substantial burdens on tribal reservations, for schools, roads, corrections, welfare and low income comprehensive tax rebates. The Court recognized those interests as valid in *Cotton Petroleum* and explicitly found no

quid pro quo or "proportionality requirement" for state taxes and expenditures. 490 U.S. at 185.

Indeed, these state responsibilities provide a valid state interest in imposing tax on Indian reservation transactions between non-members in virtually every case. Whether that interest is outweighed by some special federal or tribal interest, expressed or implied in a federal program, lies at the heart of the Indian pre-emption analysis.

B. Any Impact on Tribal Interests is Indirect and Insubstantial, and Does Not Result From Taxes Imposed On or Passed On to Tribes.

The only tribal interest that Blaze suggests may be impaired by this state tax derives from speculation that increasing cost of construction to the federal government might reduce by some yards the extent of roads the federal government builds on tribal lands and the amount of work available to the tribal members on these projects. Such speculation ignores the contrary conclusion of the finder of fact that there was no showing of impairment of tribal interests. (Pet. 37a)

Moreover, *Cotton Petroleum* explicitly rejected such a resurgent federal instrumentalities doctrine under which pre-emption would be found in every situation where a state tax had any financial effect on the tribe.[3] The decision began with a discussion of the development of intergovernmental tax immunity, emphasizing that exactly such concern over economic burdens passed on to federal or tribal governments

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[3] *See Ramah*, 458 U.S. at 853-855 (Rehnquist, J. dissenting).

was rejected years ago with the repudiation of the federal instrumentalities doctrine. 490 U.S. at 173-175. After finding no congressional intent to pre-empt, the Court returned to a discussion of the effect of the tax on tribal interests. It acknowledged that the New Mexico severance tax could, indeed, affect the tribe indirectly, just as Blaze argues here.

> It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate.

Cotton Petroleum, 490 U.S. at 186-187. But that indirect burden was not enough.

> Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.

Id. Allowing such indirect burdens to pre-empt state tax would simply reinstate the repudiated federal instrumentalities doctrine.

> To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. *Any adverse effect on the Tribe's financial interest caused by the taxation of a private party*

> *contracting with the Tribe would be grounds to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.*

Id. (emphasis added).

Blaze is relying on just such an indirect effect here. This Court's recent rejection of that argument counsels against the granting of *certiorari*.

C. Congress Clearly Intended These Indian Reservation Roads to be Treated the Same as Other Federal Lands Highways.

The final reason for denying *certiorari* is that the most significant factor in the Indian pre-emption analysis confirms the correctness of the decision below.

In *Cotton Petroleum*, the Court returned the primary focus of the Indian pre-emption analysis to a determination of congressional intent. First, the Court acknowledged that pre-emption is "primarily an exercise in examining congressional intent." 490 U.S. at 176. Then it proceeded to a thorough examination of the Indian Minerals Leasing Act and its legislative history, concluding that it was "fully consistent with an intent to permit state taxation of non-member lessees." *Id.* at 177-183. While the Court noted the language from *Bracker* and *Ramah* concerning the balancing of state, federal and tribal interests, the Court did not decide the pre-emption issue by cataloguing and balancing those interests, but by a determination of congressional intent.

An examination of the relevant federal statute here, which authorized Blaze's road-building projects, makes unmistakably clear that Congress specifically intended that these Indian reservation roads be treated the same as other Federal Lands Highway Program roads. 23 U.S.C. § 204(a) states

> (a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

This subsection emphasizing uniform treatment was added in Pub. L. 97-424, January 6, 1983; the former 23 U.S.C. § 208 specifically referring to Indian reservation roads was repealed in the same Act, further driving home the fact that no special treatment is afforded Indian reservation roads.[4]

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[4] Only a few differences in administration of these several types of roads are provided. Forest highways and public lands highways are administered by the Secretary of Transportation; park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. Indian employment may be used on Indian reservation roads and no ceiling on Federal employment is applicable; the "Buy Indian" Act and provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. Otherwise these programs are administered the same way.

There is no question that contractors building federal lands highways on forest land or park land must pay state gross receipts tax on their receipts from the projects. See, *United States v. New Mexico*. Nothing in the authorizing statute—23 U.S.C. § 204—intimates in any way that Indian reservation roads are to be treated any differently for state tax purposes. Legislative history supports the interpretation that all these Federal lands highways are to be treated alike. The Conference Committee Report to the 1983 amendments in Pub. L. 424 emphasized that in both the House and Senate bills the "Secretary of Transportation is made responsible for oversight and coordinating the Federal lands highways in order to ensure that such highways are treated under the same uniform policies." 1982 U.S. Code Congressional and Administrative News, 3709-3710.

The few regulations promulgated concerning Indian reservation road construction hardly evidence a "comprehensive federal scheme" indicative of a congressional intent to pre-empt state authority to tax. See 25 C.F.R. §170 *et seq*. Those regulations show that the Commissioner of Indian Affairs—not the tribes—plans, surveys, designs and constructs these roads, just as the other federal administering agencies do for federal lands highways built on other federal lands within those agencies' jurisdiction. The roads must be approved by the Secretary of Transportation. The tribes, like other local governments in whose jurisdiction federal lands highways are being built, establish priorities. Although the tribes may contribute to the cost of these roads, 25 C.F.R. § 170.6a, as may the states, 25 C.F.R. § 170.7, no such contribution is required, and none was made here. Any alleged pre-emptive effect of these few regulations is further weakened by the fact that the statute cited by several of the

regulations for authority—23 U.S.C. § 208—was repealed in 1983.

There is no implication anywhere in the statute or regulations governing the Federal Lands Highway Program of a congressional intent to maximize the benefit to those using these various roads by maximizing the miles of road built under the program. The Court in *Cotton Petroleum* discounted such maximization language, in any event, even where found in legislative history. 490 U.S. at 178-179.

This absence of any express or implied indication that Congress intended to pre-empt state authority to tax federal contractors building these Federal lands highways should end Blaze's pre-emption argument. The New Mexico Supreme Court's decision reflects a proper and unremarkable implementation of current law and should be left undisturbed.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

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